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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1210.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE SOUTHERN PACIFIC COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED JULY 8, 1890.

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INDEX.

	Original.	Print.
Transcript from civil district court, parish of Orleans	1	1
Petition	2	1
Exhibit A—Agreement between Collis P. Huntington and Jay Gould, November 26, 1881	13	7
B—Agreement between Collis P. Huntington and Jay Gould, February 18, 1885	32	18
C—Decree of district court of the 3d judicial district of New Mexico in case of Texas & Pacific R'y Co. *vs.* Southern Pacific R. R. Co. of New Mexico	39	21
Exception to petition	47	25
Evidence on exception	52	28
Exhibits, &c., offered	52	28
Testimony of C. C. Gibbs	55	29
John A. Grant	71	39
E. B. Wheelock	77	42
C. C. Gibbs (recalled)	83	45
E. W. How	91	49
Eugene H. Hinton	101	55
E. B. Wheelock (recalled)	104	57
A. C. Hutchinson	106	58
Note of evidence on exception	107	59
Chapter 403, an act to incorporate the Southern Pacific Co.	109	60
Act to incorporate Galveston Bay R. R. & Lumber Co.	115	63
Act for relief of Sabine & Galveston Bay R. R. & Lumber Co.	122	67

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 25, 1890.

	Original.	Print.
Amendment of act to incorporate Sabine & Galveston Bay R. R. & Lumber Co.	123	67
Act to incorporate Buffalo Bayou, Brazos & Colorado R. R. Co.	127	69
Supplement to act to incorporate Buffalo Bayou, Brazos & Colorado R. R. Co.	134	72
Order maintaining exceptions	142	76
Motion and rule for new trial	143	77
Order discharging rule for new trial	145	78
Motion and order for appeal	146	78
Bond on appeal	147	78
Clerk's certificate	149	79
Charter and other legislation relating to Texas & Pacific R'y Co.	150	80
Act to incorporate the Texas Pacific R. R Co., &c., March 3, 1871	152	80
Act changing name of company, &c., May 2, 1872	164	87
Supplement to act of incorporation, March 3, 1873	168	90
Supplement to act of incorporation, June 22, 1874	169	90
Charter of Texas Western R. R. Co., February 16, 1852	170	91
Amendment of charter Texas Western R. R. Co., August 16, 1856	177	95
Act to encourage construction of railroads in Texas, &c., January 30, 1854	180	97
Act to provide for investment of special school fund, &c., August 3, 1856	186	101
Amendment to school fund act, August 26, 1856	194	106
An act for relief of railroad companies	195	106
Charter of Southern Transcontinental R'y Co., July 27, 1870.	196	107
Act to encourage speedy construction of railways through Texas to the Pacific Ocean, May 24, 1871	201	110
Amendment to act to encourage speedy construction, &c., November 21, 1871	207	114
Agreement fixing point of junction, May 6, 1872	212	117
Deed of conveyance So. Pac. R. R. Co. to T. P. R. R. Co., March 21, 1872	213	118
Deed of conveyance So. Transcontinental R'y Co. to T. P. R. R. Co., March 30, 1872	216	119
Act to adjust and define the rights of T. & P. R'y Co. in Texas, May 2, 1873	218	121
Act to extend time for construction of works of internal improvement, April 30, 1874	228	127
Act to extend time for construction of works of internal improvement, March 15, 1875	229	128
Ordinance adopted by constitutional convention in relation to railroads, September 6, 1875	231	129
Index to foregoing pamphlet	232	129
Exhibit X—Map	234	130
Transcript on appeal filed	235	130
Assignment of errors	236	131
Answer to appeal	237	131
Order for continuance after hearing	237	132
Order for continuance after hearing	238	132
Order taking cause under advisement	238	132

	Original.	Print,
Judgment	239	133
Reasons for judgment	240	133
Suggestion of death, &c., of John C. Brown	257	144
Order on suggestion of death, &c., Jno. C. Brown	258	144
Petition for rehearing	259	145
Order denying rehearing	270	152
Petition for writ of error	270	153
Order refusing writ of error	272	153
Copy of writ of error	272	154
Bond	275	155
Clerk's certificate	276	155
Chief justice's certificate	277	156
Writ of error	278	156
Citation	281	157
Proof of service of citation	282	158
Assignment of errors	283	158

1 STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Civil District Court, Parish of Orleans.

THE TEXAS AND PACIFIC RAILWAY COMPANY *vs.* SOUTHERN PACIFIC COMPANY. } No. 23755. Civil District Court, Division D.

Filed April 11th, 1888.

2 *Petition. Filed April 11th,* 1888.

To the honorable judges of the civil district court for the parish of Orleans:

The petition of the Texas and Pacific Railway Company, a corporation created by and under the laws of the United States, to wit, under the act of Congress approved Mar. 3rd, 1871, chap. 122; act approved May 2nd, 1872, chap 132; act approved March 3rd, 1875, chap. 257, and act approved June 22nd, 1874, chap. 406, of 1874, and which corporation has certain rights, property, powers, privileges, and franchises by the consolidation with it of the Southern Pacific Railway Company of Texas and the Southern Transcontinental Railway Company of Texas, recognized, affirmed, and approved by said act of Congress of June 22nd, 1874, and which corporation has also acquired by deed of consolidation of June 20th, 1881, the railway and railway rights of the New Orleans Pacific Railway Company, a corporation created by the act of the General Assembly of the State of Louisiana, No. 14 of 1876, being the consolidation referred to and recognized in the 7th article of the agreement "A" hereinafter set forth, and which petitioner is herein represented by John C. Brown, now sole receiver of its property, appointed as such by the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the cause entitled "The Missouri Pacific Railway Comp'y — The Texas and Pacific Railway Company, No. 11181 of the docket of the last-named court, and in auxiliary proceedings and suits of *pre*closure in said U. S. circuit court throughout Louisiana and Texas, and the said John C. Brown joining
3 herein as petitioner, respectfully shows—

That the said petitioners have places of business and offices in Dallas and Marshall, in the State of Texas, and in New Orleans, in the parish of Orleans, and the lines of railway of said Texas & Pacific railway extend or reach by track-running arrangements or connections from El Paso, in the State of Texas, to New Orleans and to Galveston, in Texas.

That on or about the 26 November, 1881, Collis P. Huntington, of the city of New York, for and in behalf of himself (who now controls and operates the company, defendant herein) and for and on behalf respectively of the Southern Pacific Railway Company of California, the Southern Pacific Railway Company of Arizona, the Southern Pacific Railway Company of New Mexico, the Galveston, Harrisburg and San Antonia Railway Company, the Texas and New Orleans Railway Company of Texas, and the Louisiana Western Railway Company of Louisiana, and any extensions thereof owned or controlled by said Huntington or said railway companies above named or any of them, of the first part, and Jay Gould, of the city of New York, for himself and associates and for and on behalf respectively of the Texas and Pacific railway, the International and Great Northern Railway Company, and the Galveston, Houston and Henderson Railway Company of Texas and for and on behalf of the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company, parties of the second part, made and entered into an agreement, of which a copy is hereto annexed and made hereof as Exhibit "A" of this petition.

That thereafter, on or about the 18th February, 1885, the said agreement was amended, by the modification of which a copy is hereto annexed and made part hereof as Exhibit "B" of this petition.

That, as appeared by said contract, it was made out only in consideration of the mutual promises of the parties, but in — 4 of the settlement of important litigation then pending between parties thereto in the courts of Texas, Arizona, and New Mexico respecting claims of parties of the first part and properties, rights of way, and franchises of the Texas and Pacific Railway Company not only in Texas but West of El Paso, and in consideration of the agreement of said Texas and Pacific Railway Company, as set forth in said contract, to construct its tracks and make a junction at the point selected eastward from El Paso, as set forth in article I; to relinquish rights of the Texas and Pacific Company in said Territories of Arizona and New Mexico, as set forth in article II; to cede and transfer to said Southern Pacific companies its said grants west of El Paso conferred on it by act of Congress of March 3rd, 1871, as set forth in article III, and to cede to said Southern Pacific companies its corporate rights and franchises west of El Paso, as set forth in article IV, and to perform the other obligations imposed on said Texas and Pacific Railway Company by said agreement.

That, as provided by said agreement, the same and its modifications have been duly adopted and ratified by the several corporations mentioned as parties therein and said ratifications exchanged, and the personal undertakings of said Huntington and Gould in the premises have ceased.

That all the acts required in said agreement to be done by the Texas and Pacific Railway Company have been done and all the relinquishments, cessions, conveyances, and transfers of rights, grants, property, and franchies provided thereby to be made have been promptly made by it and accepted by parties of the first part to said agreement and by the defendant in this cause, and the said agreement in all things has been duly complied with by the said Texas and Pacific Railway Company, as well as by the other parties of the second part.

That in pursuance of said agreement the same was duly
5 made a decree of the court in the said litigation herein referred to and in said courts of Texas, New Mexico, and Arizona, as by duly certified copies of said decrees will appear and in the form shown by the copy hereto annexed as part hereof and marked Exhibit "C."

Which decrees confirmed *with* and carried out said agreement.

That by the article VI of said agreement it was provided as follows:

"It is further mutally agreed that all unconsigned business, meaning all business whereof the route has not been designated in advance, destined for points west of El Paso, received by the said Texas and Pacific Railway Company shall be turned over to the Galveston, Harrisburg and San Antonia Railway Company at the junction or to the Southern Pacific Railroad Company at El Paso, as the case may be, and all such unconsigned business received by the Southern Pacific companies, and destined to places east of the junction reached by the Texas and Pacific railway and its connections north of Shreveport, La., and west of the Mississippi river shall be delivered to the Texas and Pacific Railway Company at the junction or at El Paso, as the case may be. The gross earnings on all business passing over either of these roads between El Paso or the junction and New Orleans shall be divided equally, and the gross earnings on all business passing over either of these roads between El Paso or the junction and Galveston shall be divided on the basis of two-thirds thereof to the Galveston, Harrisburg and San Antonia Railway Company and its connections and one-third thereof
to the Texas and Pacific Railway Company and its connec-
6 tions, and the agents are to divide as nearly as possible such business between the two through lines, so that each shall do the portion of the business above allotted.

In the event that either of the said companies of the one party, at either of the termini herein mentioned, shall be unable or shall neglect or refuse for any cause to take the business and to perform the said service in the proportions above named, the company or companies of the other party shall be at liberty, so long as such disability continues, to take such business and perform such service and shall be entitled to receive the compensation thereof.

The Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, the St. Louis, Iron Mountain and Southern Railway Company, the International and Gt. Northern Railroad Company, and the Galvestern, Houston and Henderson Railroad Company shall severally take the through business any of them may have to do under this agreement between El Paso and any point on the Mississippi river without any discrimination as to rate or otherwise in favor of any line, road, or transportation company, and with equal dispatch, and this provision applies to business destined to or coming from any railroad east of the Mississippi river.

There shall be no discrimination as to local business by any of the roads of either of the parties as against those of the other party, it being understood that the term "through business" as used in this agreement applies to traffic carried to and from terminal points, and any points upon the lines of the railways of the parties hereto that may be reached directly or indirectly by any railroad competitive to either of said roads is understood to be a competitive point."

That by said modification of said agreement hereinbefore referred to it was provided as follows:

7 "That the sixth article of said agreement (above quoted) be, and the same is hereby, modified and changed as follows:

"In lieu of the business prescribed by the first paragraph of the subdivision VI of said agreement it is agreed that each road shall be entitled to reserve and retain to itself sixty per cent. (60 %) of its gross earnings on the business referred to as the costs of doing the same, and the balance, forty per cent. (40 %) thereof, shall be divided as follows:

In respect to the New Orleans traffic the Galveston, Harrisburg and San Antonio Railway Company and its connections shall be entitled to one-half of such balance and the Texas and Pacific railway and its connections to the other half thereof.

In respect of Galveston traffic the Galveston, Harrisburg and San Antonio Railway Company and its connections shall be entitled to two-thirds of such balance and the Texas and Pacific Railway Company and its connections shall be entitled to the other one-third thereof, and the foregoing provisions shall be applicable to and include the earnings between New Orleans and Galveston and El Paso and the junction on business carried from or to New York by the steamers of the Morgan line, and also all business without any exception to, from, or through New Orleans or Galveston and junction or El Paso, including steamship business via Morgan city, Gouldsboro', Algiers, or other points to include in the port of New Orleans: Provided, however, That all the grain business originating on the Southern Pacific line may be carried by the Galveston, Harrisburg and San Antonio Company and its connections, and all earnings therefrom shall belong to the roads carrying the same unless the through rate therefor from the original point of shipment to New Orleans and Galveston exceed four and one-half mills per ton per mile, in which case the excess, but only the excess,
8 above four and one-half mills per ton per mile shall be divided between the Galveston, Harrisburg and San Antonio Railway Company and its connections and the Texas and Pacific Company and its connections according to the proportion above described.

Second. That the "Southern Pacific Company," a corporation created and existing by and under the laws of Kentucky, but doing business in Louisiana and having a principal place of business in the city of New Orleans, and of which A. C. Hutchinson, of New Orleans, is a general manager, and authorized for it to receive service of citation herein, and which Southern Pacific Company is controlled by said Collis P. Huntington, also its vice-president, and his associates mentioned in said agreement, has, about November, 1884, taken possession and control of all the railway companies mentioned in said agreement as parties of the first part, and also of Morgan's Louisiana and Texas Railroad and Steamship Company, being said "Morgan's line, whereby its system is extended to and reaches the city of New Orleans from the eastern terminus of the Louisiana Western railway, and extends by Morgan's steamers to New York and of the properties of said companies and the properties and rights transferred by said agreement, and has since been and is now operating said railroads and steamers as its own, forming through lines to and from California, New Orleans, New York, and the Atlantic system" of said Southern Pacific Company forms the through lines from and to El Paso and New Orleans and by connections and running arrangements to and from Galveston and said other points.

That upon taking possession and control as aforesaid the said Southern Pacific Company adopted as its own the said agreement and modification and assumed the same in all respects and claims all rights thereunder of parties of the first part, and rendered
9 sundry accounts to petitioners and statements in writing concerning New Orleans and Galveston traffic under said agreements and modifications and received statements thereunder from petitioners, and since said adoption and assumption has been and now is liable as part-s of the first — for all the obligations of the parties thereto of the first part and their extension to New Orleans and New York, the said Morgan's Louisiana and Texas Railroad and Steamship Company.

That down to March 31st, 1887, said Southern Pacific Company has rendered to petitioners as aforesaid monthly statements of said business done by it under said agreement and modification and subject — division under same as therein provided. Petitioners do not admit the correctness of said statements, and have always denied the correctness of certain items sought by said Southern Pacific Company to be deducted as its expenses of doing said business in the Transcontinental Association or pool and other expenses, but they aver as above, and they show that in writing and by acts the said Southern Pacific Company has during the time aforesaid adopted its said business under said agreement, possessed and enjoyed the property and rights conveyed thereunder and in pursuance thereof by said Texas and Pacific Railway Company, recognized petitioners as the parties to whom accounting should be made and with whom settlement should be made under said agreement and modification of New Orl'ns and Galveston traffic as aforesaid, as well as other obligations of said agreement, and is liable to petitioners as herein claimed.

That by article XV (15) of said agreement it is provided that either or any of the said several railway companies parties thereto may maintain any action at law or in equity against either, any, or all of the other railroad companies parties to the agreement to
10 protect any right secured by the agreement to specifically enforce the same or to recover damages for the breach of any stipulations in the agreement affecting its interest, and that no objection shall be had or taken to any such action by reason of non-

joinder of parties as plaintffs, and all clauses of the agreement are to be so construed as to secure this right.

That the said Southern Pacific Company has repeatedly, in writing and otherwise, dealt with petitioners as to the obligations of said agreement with respect to said New Orleans and Galveston traffic and other obligations thereof to petitioners.

That about March, 1887, it entered upon an arbitration with petitioners, alleging that it was useless to settle with petitioners the demands of petitioners as then existing and certain questions of dispute then unjustly set up by said Southern Pacific Company, but after much labor and argument said arbitration was broken up by the fault of said Southern Pacific Company.

That said Southern Pacific Company is indebted to petitioners as aforesaid under the operation of said division of earnings on New Orleans and Galveston business, according to said agreement as so modified down to March 31st, 1887, in the sum of three hundred and fifty thousand seven hundred and seventeen *thousand* dollars and seventy-eight cents, with interest in monthy balances from December 1, '84.

That since the 31st March, 1887, the said Southern Pacific Co., though duly demanded, has neglected and refused to permit its customary monthly statements of said New Orleans and Galveston business under said agreement, but petitioner is informed and believes and therefore charges that the indebtedness of said Southern Pacific Company to your petitioners as aforesaid accruing
11 from March 31st, 1887, to March 31st, '88, on said account exceeds the sum of two hundred thousand dollars, with interest on monthly balances.

Petitioner cannot, through the said neglect and fault of defendant, state precise sum, but is entitled to discovery and decree for the same, and the said Southern Pacific Co. is bound to account for the same for said period to petitioners and to furnish proper data for such discovery and accounting under direction of the court.

And further demands accruing to petitioners under said agreement are reserved.

Third. Petitioner further shows that under the terms of said agreement and in equalization of rates on New Mexico and Arizona business the said Southern Pacific Company is justly indebted to petitioners in the sum of $5,859.49, with interest from December 31st, 1886, on this item from April 28th, 1885, to December 31, 1886, which amount has been duly agreed upon by respective auditors of petitioners and said Southern Pacific Company, —, though duly demanded, — has neglected and refused to pay to petitioners.

The premises considered and alleging amicable but ineffectual demand, petitioners pray that the said "Southern Pacific Company," through A. C. Hutchinson, its general manager and agent in New Orleans, may be duly cited to appear and answer this petition, that discovering and accounting may be had herein according to law and equity, and that after due proceedings had the said Southern Pacific Company may be condemned to pay petitioners the said sum of three hundred and fifty-two thousand and seven hundred and seventeen dollars and seventeen cents, down to March 31st, 1887, and the said sum of two hundred thousand dollars or such other sum as may be found due on such discovery and accounting from March 31st, 1887, with interest on monthly balances found due month by month from November 1st, 1884, and the further sum of five 12 thousand eight hundred and fifty-nine dollars and forty-nine cents, with interest from December 31, 1886, and for costs and general relief.

(Signed) HOWE AND PRENTISS,
Att'ys for Petitioners.

13 *Exhibit Marked "A" and Annexed to Petition, Being an Agreement between C. P. Huntington with Jay Gould, and Filed April 11th*, 1888.

At a meeting of the board of directors of —— Company, held in ——, on the — day of ——, 188–, the following resolution was adopted:

Whereas C. P. Huntington, acting on his own behalf, on behalf of his associates, and on behalf of the Southern Pacific Railroad Company of California, of New Mexico, and the Southern Pacific Company of Arizona; the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, and the Louisiana Western Railroad Company, and Jay Gould, acting on his own behalf and on behalf of his associates and on behalf of the Texas and Pacific Railroad Company, the International and Great Northern Railroad Company, the Galveston, Houston and Henderson Railroad Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railroad Company, heretofore, on the twenty-sixth day of November, A. D. 1881, entered into the following contract:

Memorandum of an agreement, made this twenty-sixth day of November, A. D. 1881, in the city of New York, between Collis P. Huntington, of the city of New York, for and on behalf of himself and his associates and for and on behalf, respectively, of the Southern Pacific Railroad Company of California; the Southern Pacific Company of Arizona, and the Southern Pacific Company of New Mexico; the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company of Texas, and 14 the Louisiana Western Railroad Company of Louisiana, and any extensions thereof owned or controlled or hereafter to be owned or controlled by the said Huntington or the said railroad companies above named or any of them, of the first part, and Jay Gould, of the city of New York, for himself and on behalf of his associates and for and on behalf, respectively, of the Texas and Pacific Railroad Company, the International and Great Northern Railroad Company, and the Galveston, Houston and Henderson Railroad Company of Texas, and for and on behalf of the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company, witnesseth:

That whereas the said Huntington and associates own and control a majority interest in the said companies for whose behalf he acts as aforesaid;

And whereas the said Gould and his associates own and control a majority in the companies for whose behalf he acts as aforesaid;

And whereas divers differences have arisen and exist between the three Southern Pacific Railroad Companies above named and the said Galveston, Harrisburg and San Antonio Railway Company, on the one hand, and the Texas and Pacific railway, on the other;

And whereas, in respect to some of the said differences, various suits are now pending in the courts of Arizona, New Mexico, and Texas, threatening long-continued, troublesome, and expensive litigation;

And whereas the continuance of such litigation is injurious to all said companies and, incidentally, to the public interest, so far as the business of said lines is concerned;

And whereas said differences and litigations have been found upon conference and deliberation to be susceptible of amicable adjustment, as in this contract provided;

15 And whereas the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company own and control lines of railroad connecting with the road of the Texas & Pacific Railroad Company, and are interested in the subject-matter of this agreement, except so far as pertains to the direct controversies in the pending suits between the said Southern Pacific Railway Companies and the Galveston, Harrisburg and San Antonio Railway Company, on the one side, and the Texas and Pacific Railway Company, on the other:

Now, therefore, the parties hereto, with a view permanently to settle all controversies of the first part or any one or more of them and the companies of the second part or any one or more of them, and to prevent future controversies, and of the mutual covenants hereinafter contained—the parties hereto do covenant, promise, and agree each with the other as follows:

I.

Mutual agreement to join tracks east of El Paso.

It is mutually agreed by and between the parties hereto that the Texas and Pacific Railway Company shall continue the construction of its road now being built in Texas westward until its continuous track shall approach the track of the Galveston, Harrisburg and San Antonio Railway Company which is now building eastwardly from El Paso along the valley of the Rio Grande until the two shall meet and be connected so as to form a through line to the Pacific Ocean; the point of junction to be agreed upon between the respective chief engineers, who shall select a suitable place for such junction as nearly as practicable intermediate between the ends of the track of the said roads as now laid as aforesaid.

This point of junction is hereafter referred to in this instrument as the "junction."

II.

16 Relinquishment of Texas and Pacific claims in Territories.

The Texas and Pacific Railway Company shall release, relinquish, and convey, in such form as counsel for both parties may agree and advise, all of its right, title, interest, and estate in and to the railway constructed by the said Southern Pacific Railroad Companies of Arizona and New Mexico, and which railways, in suits now pending, are claimed by the said Texas and Pacific Railway Company to be constructed upon its rights of way, and to be property; which claims are denied by the said Southern Pacific Railway Companies.

III.

Transfer of land grant west of El Paso to Southern —.

The party of the second part further covenants, promises, and agrees that the Texas and Pacific Railway Company, being entitled, under the 9th section of the act of Congress, March 3rd, 1871, when it was incorporated, to a land grant from the United States, as shown by the said act (which land grant was made to the Texas and Pacific Railway Company, its successions and assigns), shall execute a deed whereby it shall *be* in terms assign, transfer, and make over the said land grant, in such form as counsel for both parties may advise, to the said Southern Pacific Railroad Companies, respectively, and shall allow its corporate name to be used, or, at the request or expense of said assignees, shall take such steps as the said assignees may require in order to make the said land grant available to the said assignees, and if the said assignees shall desire to procure any congressional ratification of such transfer the Texas and Pacific Railway Company and the said second parties shall not hinder nor embarrass such action, but shall promote the same in any reasonable way in its or their power.

IV.

Texas and Pacific to cede franchise west of El Paso.

17 The party of the second part further agrees that the Texas and Pacific Railway Company shall execute an instrument whereby it undertakes to cede and make over all its corporate rights and franchises west of El Paso to the said Southern Pacific Railroad Companies, respectively, their successions and assigns, as the case may be.

And congressional ratification thereof shall contain a provision that they are acquired by the said Southern Pacific Railroad Companies or said assigns subject to the right of the Texas and Pacific Railway Company and a reciprocal right on the part of said Southern

Pacific Railroad Companies to have the entire roads of each of all said companies operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line; and the said Texas and Pacific Railway Company shall convey to the Southern Pacific Company of California, or to such company as may be designated by the party of the first part, all of the rights, title, and interest to any and all property, rights, and franchises in the State of California and near the city of San Diego.

V.

Undertakings of the party of the first part.

In consideration of the foregoing agreements, and especially the agreement of the Texas and Pacific Railway Company relinquishing, releasing, and conveying its right, claim, title, interest, and estate in and to the road and way and right of way on which the railroad is constructed in New Mexico and Arizona, the said Huntington, for himself and for the said railroad companies on whose behalf he acts, covenants, promises, and agrees to and with said
Gould and with each of the companies on whose behalf he
18 acts as follows; roads to be operated as one through line and
earnings divided :

1st. That he will on his part procure or cause to be procured an agreement that the road of the Texas and Pacific Railway Company and the road of the Southern Pacific Railroad Companies shall be operated as aforesaid as one through continuous line, and that the gross earnings from all through business paying over one of said company lines to the other shall be divided between them in proportion to distance hauled by each, with equitable and reasonable allowances to each for terminal expenses, not to exceed the current charges on similar business handled by the Union and Central Pacific line, and no terminal charges elsewhere by either of the parties shall exceed those at San Francisco.

Rates and joint agents.

2nd. That the said companies of the parties of the second part and each of them may establish offices and agencies at San Francisco, Los Angeles, San Diego, and all other points and places on the Pacific coast and competing points on the Pacific slope reached by the Southern Pacific railroads and their connections, and contract for through business of all kinds, including freight and passengers, via the lines of the said railroads of the party of the first part; and the said companies constituting the parties of the first part shall carry for the Galveston, Harrisburg and San Antonio Railway Company, the Atchison, Topeka and Santa Fé Railroad Company, the Union Pacific Railway Company, the Atlantic & Pacific Railroad Company, or any other connecting companies, not to exceed the *pro rata* per mile of the through rate, with allowance for terminal expenses as aforesaid, and that all the rates via this line between all the points on the Pacific coast and competitive

points on the Pacific slope and the East shall be at all times as low as by any other route, and if any dispute arises between the parties as to whether the through rate is as low as by any other route the agents of the parties of the second part shall have the
19 right to make the through rates on west-bound business until such dispute shall be adjusted by arbitration as herein provided. A reciprocal right in all east-bound business is in all respects to be accorded to the parties of the first part.

To save expense and to prevent disagreement it is agreed that at the principal competing points in the East and West the soliciting agents shall be joint agents and be jointly appointed.

VI.

Mutual agreement to "pool" New Orleans and Galveston traffic and not to discriminate against Mississippi termini.

It is further mutually agreed that all unconsigned business, meaning all business whereof the route has not been designated in advance, destined for the points west of El Paso received by the Texas and Pacific Railway Company shall be turned over to the Galveston, Harrisburg and San Antonio Railway Company at the junction or to the Southern Pacific Railway Company at El Paso, as the case may be; and all such "unconsigned" business received by the Southern Pacific Companies and destined to places east of the junction reached by the Texas and Pacific Railway Company and its connections north of Shreveport, La., and west of the Mississippi river shall "be delivered to the Texas and Pacific Railway Company at the "junction" or at El Paso, as the case may be. The gross earnings on all business passing over these roads between El Paso or the "junction" and New Orleans shall be divided equally, and the gross earnings on all business passing over either of these roads between El Paso or the junction and Galveston shall be divided on the basis of two-thirds thereof to the Galveston, Harrisburg and San Antonio Railway Company and its connections and one-
20 third thereof to the Texas and Pacific Railway Company and its connections, and the agents are to divide as nearly as possible such business between the two through lines, so that each shall do the proportion of business above allotted.

In the event that either of the said companies of the one party, at either of the termini herein mentioned, shall neglect or refuse for any cause to take the business and to perform the said service in the proportions above named, the company or companies of the other party shall be at liberty, so long as such disability continues, to take such business and perform said service and shall be entitled to receive the compensation therefor.

The Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the St. Louis, Iron Mountain and Southern Railway Company, the International and Great Northern Railroad Company, the Galveston, Houston and Henderson Railroad Company shall severally take the through business any of them may have to do under this agreement between El Paso and any point on the

Mississippi river without any discrimination as to rate or otherwise in favor of any line, road, or transportation company and with equal dispatch, and this provision applies to business destined to or coming from any railroad east of the Mississippi river.

There shall be no discrimination as to local business by any of the roads of either of the parties as against those of the other party, it being understood that the term "through business," as used in this agreement, applies to traffic carried to and from terminal, common, or competitive points, and any point — the lines of the railways of the parties hereto that may be reached, directly or indirectly, by any railroad competitive to either of said roads is understood to be a competitive point.

21 Louisiana Western to use Texas and Pacific track into New Orleans.

The party of the second part further covenants and agrees that the Texas and Pacific Railway Company shall, at the request of the said Huntington, in the event that it shall become desirable in his judgment to connect the present terminus of the Louisiana Western railroad at Vermillionville by a line of railroad therefrom to the Mississippi river so as to intersect and effect a junction with the road of the New Orleans Pacific Railway Company (now consolidated with and forming a part of the Texas and Pacific Company) at or in the vicinity of Bayou Goula, take the business of such railroad and its connections between such point of intersection and New Orleans promptly, without undue preference or discrimination, as nearly as may be, in the time and manner of its own traffic (details of which shall be settled by the respective superintendents or by arbitration, as herein provided for the settlement of disputes arising hereunder), or, at the option of said Huntington, the said Louisiana Western Railroad Company or any extension thereof shall have the — to a perpetual joint use for the passage of its trains from the point of the intersection to the terminus of the Texas and Pacific railway opposite New Orleans equally with the Texas and Pacific Railway Company upon such regulations as shall be prescribed by their respective superintendents, paying therefor six per cent. per annum, semi-annually, upon $10,000 per mile and one-half of the cost of maintenance, renewals, and taxes.

22 In the event of such extension of said line of road to Bayou Goula or any intersecting point with the Texas and Pacific railway upon the Mississippi river, then Bayou Goula or such intersecting point shall be treated, in reference to the division of business and earnings, the same as New Orleans.

VIII.

Mutual agreement not to duplicate roads of each other.

It is further mutually covenanted and agreed by and between the parties hereto that while the running and pooling arrangements and agreements herein are kept and observed by the parties of the first part the parties of the second part shall not build nor promote, except through executive committee in the manner hereinafter provided, directly or indirectly, the building of any other parallel or through line from the junction or any point west thereof to the Pacific Ocean or to the tidal waters thereof and any line duplicating in whole or in part or the building of any line to connect with any other line so as to duplicate in whole or in part the said lines or roads of the said parties of the first part; and the parties of the first part shall not build nor promote, except through the executive committee in the manner hereinafter provided, directly or indirectly, the building of any road west of the Mississippi river which shall be parallel to or duplicate in whole or in part the said line or roads of the party of the second part or the building of any line to connect with any other line so as to duplicate in whole or in part the said lines or roads of the said party of the second part.

IX.

23 Mutual agreement not to purchase or control competing roads except through executive committee.

The parties hereto further agree each with the other that there shall be an executive committee consisting of C. P. Huntington and Jay Gould and such third person as may be selected, and in the event that either of the parties hereto subscribing or their associates shall be offered within the period covered by this agreement the one-half stock interest in the Atlantic and Pacific Railroad Company held by the Atchison, Topeka and Santa Fé Railroad Company, or its equivalent, with securities of said Atchison, Topeka and Santa Fé Railroad Company or any securities, though less than one-half, which may lead to control of said companies or either of them, such offer shall be submitted to the said executive committee, and no such purchase thereof shall be made, directly or indirectly, except with sanction of said committee.

In like manner, should the half interest in said Atlantic and Pacific Railroad Company be offered either separately or in conjunction with securities of the said St. Louis and San Francisco Railroad Company or any securities, though less than one-half, which shall lead to the control of said companies or either of them, including the St. Louis and San Francisco Railroad Company, such offer shall be referred to the said executive committee, and no such purchase shall be made, directly or indirectly, except with the sanction of said committee.

And in the event that either or both of said interests are acquired or the control of said roads or either of them, including the St. Louis
and San Francisco Railroad Company, is achieved in any
24 manner, such road shall be transferred to and held and man-
aged by said executive committee as may be determined for
the interest and benefit of the parties thereto.

X.

Road between junction and El Paso to be jointly used by Galveston, Harrisburg & San Antonio Railway Company and by Texas and Pacific Company.

And the said Huntington further agrees, covenants, and promises that the Galveston, Harrisburg and San Antonio Railway Company shall execute arrangement to conduct, for and in consideration of a *pro rata* share, according to haul, of the charges as aforesaid, all the business of the Texas and Pacific Company between junction and El Paso promptly, without undue preference or discrimination, as nearly as may be, in the time and manner of its own traffic (the details to be settled by the respective superintendents or by arbitration, as herein provided), or that, at the option of the Texas and Pacific Company, it shall have the right to a perpetual joint use of the road and telegraph between junction and El Paso equally with the Galveston, Harrisburg and San Antonio Railroad Company upon such regulations as may be presented by sheir respective superintendents, paying therefor six per cent. per annum, semi-annually, upon $10,000 per mile and one-half the cost of the maintenance, renewals, and taxes; and in the event of such election by the Texas and Pacific Railway Company the interchange of business above provided for in this contract shall be made at El Paso.

XI.

Galveston, Houston and Henderson railroad to be used by both parties.

It is further agreed that the Galveston, Houston and Henderson Railroad Company shall conduct all of the business of the
25 Galveston, Harrisburg and San Antonio Railway Company and of the Texas and New Orleans Railroad Company between Houston and Galveston promptly, without undue discrimination, as nearly as may be, — the time and manner of its own traffic (the details to be settled by the respective superintendents or by arbitration, as herein provided), or, at their option, the Galveston, Harrisburg and San Antonio Railroad Company, the Texas and New Orleans Railroad Company, or either of them shall have the right to a perpetual joint use of the said road between Houston and Galveston equally with Galveston, Houston and Henderson Railroad Company or its successors, as the same may be reorganized, upon such regulations as may be prescribed by their respective superintendents, paying therefor six per cent. per annum, semi-annually, upon $10,000 per mile and one-half the cost of maintenance, renewals, and taxes, said payment to be made by one of said companies, as they agree.

XII.

Central Pacific to prorate between Goshen and San Francisco.

The said Huntington undertakes and guarantees to procure the assent of the Central Pacific Railroad Company to comply with the provisions hereof so far as its line between Goshen and San Francisco constitutes a link in the operation of the through line in this agreement provided for until the Southern Pacific railroad is completed by a continuous line of its own into San Francisco without intervention of a ferry.

26

XIII.

Same telegraph company to do commercial business over entire routes.

And the party of the first part further agrees that the existing contracts with the Western Union Telegraph Company shall be extended for the further period of ten years, by which all commercial business, so far as the same can legally be done, shall be secured to the said telegraph company; but the terms thereof shall not be less favorable to the railroads represented by the party of the first part than the existing contract between the Central Pacific, Southern Pacific, and other railroad companies and the Western Union Telegraph Company.

This, however, shall not be held to affect or disturb existing contracts east of San Antonio.

XIV.

Texas and Pacific to dismiss suits or enter decrees by consent and relinquish claims to Southern Pacific railroads.

Whereas there is a suit pending in New Mexico between the Texas and Pacific Railway Company and the Southern Pacific Railroad Company of New Mexico, and also a suit pending in Arizona between the Southern Pacific Company of Arizona and the Texas and Pacific Railway Company, in which suits Texas and Pacific Railway Company claims the way and right of way on which the Southern Pacific Railroad Companies have constructed a railroad through said Territories, which claim is disputed and denied by said Southern Pacific Railroad Companies, and nothing in this agreement shall be construed as an admission of such right;

27 And whereas the Texas and Pacific Railway Company claims title to said road, which claims are disputed and denied by the Southern Pacific Railroad Companies;

And whereas the Texas and Pacific Railway Company has by this agreement relinquished and released to said Southern Pacific Railroad Companies all of its right, title, interest, and estate in and to the said way, right of way, and railroad constructed by the Southern Pacific Railroad Companies in New Mexico and Arizona;

And whereas the Texas and Pacific Railway Company is entitled by its charter to make running arrangements with any other railroad company or companies;

And whereas the consideration to the said Texas and Pacific Railway Company for the said relinquishment and release is the agreement of the said Southern Pacific Railroad Companies that the said road of the Texas and Pacific Railway Company and the roads of the three said Southern Pacific Railroad Companies and their connections shall be operated forever as one continuous through line as aforesaid, and that the gross earnings from all through business passing from one said company's line to the other shall be divided between them in proportion to the distance hauled by each, with allowances for terminal expenses as aforesaid :

Now, therefore, it is agreed that decrees may be entered in said suits in New Mexico and Arizona whereby the right of the Texas and Pacific Railway Company and the three Southern Pacific Railroad Companies to have their respective roads operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line, and the gross earnings from all through business passing from one of said companies' lines to the lines of the others divided between them in proportion to the distance hauled by each, with allowances for terminal expenses as aforesaid, shall be reserved,
28 conceded, and established as perpetual privilege and easement appertaining to the road of each said companies and over the road or roads of the others.

XV.

Right to maintain actions; mutual covenant as to arbitration in case of disputes.

It is understood that either or any of the several said railroad companies parties to this agreement may maintain any action, either at law or in equity, against either, any, or all of the other railroad companies parties to this agreement to protect any right secured by this agreement, to specifically enforce the same, or to recover damages for the breach of any stipulationsin this agreement affecting its interests, and that no objection shall be had or taken to any such action by reason of non-joinder of parties as plaintiffs, and all clauses in this agreement contained are to be so construc*te*d as to secure this right.

It is further mutually agreed between the parties hereto that in case *of* disagreements of any kind shall arise at any time between them, or any two or more of the companies in whose behalf they respectively act, as to any act or omission to act under this agreement or as to the meaning of any clause or provision thereof, or at the request of either of such parties, *or* arbitrat*ion* shall be appointed by each of the said parties so disagreeing, and a third arbitrat*ion* shall be chosen by the two so appointed, and the decision of said arbitrat*ion*, or a majority of them, given after a hearing of which both parties shall be duly notified and at which they shall have an opportunity to be heard, shall be final and binding on both parties as to the matter or matters in issue between them; and, in case of such arbitration, each party to this agreement covenants, for him-
29 self and itself, its successors *or* and assigns, with each of the other parties to this agreement and its successors and assigns that it will forthwith, upon the rendering of any decision as afore-

said, comply with and perform the requirements thereof; and, further, will pay any sum or sums of money which it may be required to pay by such award. A failure to appoint arbitrators or to comply with their award or decision shall be a breach of this contract.

Discontinuance of suits and relinquishment in Texas.

All suits between the said companies parties to this agreement or any of them, except those in which decrees are to be entered as aforesaid, are to be discontinued as soon as practicable after the execution thereof.

And the Texas and Pacific Railway Company shall execute a conveyance, for the consideration of the sum of one dollar, to the Galveston, Houston and San Antonio Railway Company, granting to it the necessary and convenient way and right of way and station grounds wherever the said railroad shall cross or be laid upon the lands of the Texas and Pacific Railway Company, whether granted to the State of Texas or otherwise, and shall renounce, release, and relinquish all claim, title, or interest in and to said railroad claimed or included in any suit or suits pending in said State.

A release is to be procured from G. M. Dodge of right of way over any lands standing in his name in the State of Texas. The agreements and each of them herein are of perpetual obligation.

Exchange of ratification by companies.

The foregoing agreement shall be submitted by the respective parties thereto to the several boards of directors of the corporations which they respectively represent, and the same shall be accepted,
adopted and ratified, confirmed, made, and declared by said
30 several boards of directors to be the act and contract of their
respective corporations, so far as the same severally affects them respectively; and thereupon each corporation shall deliver to each other corporation certified copies of its proceedings in the premises, signed by the president and countersigned by the secretary thereof and sealed with its corporate seal, within ninety *the* days from the date thereof.

In testimony whereof the said parties have hereunto set their hands, in the city of New York, in duplicate, on the day and year first above written.

(Signed) C. P. HUNTINGTON.
" JAY GOULD.

It is understood that when the said several companies shall have executed an exchange of ratifications as aforesaid the personal undertakings of Mr. Huntington and Mr. Gould shall cease.

(Signed) C. P. HUNTINGTON.
" JAY GOULD.

And whereas it is considered and believed that said contract is just, fair, and reasonable and for the benefit and advantage of this corporation: Now, therefore,

Resolved, That said contract be, and the same is hereby, ratified and confirmed, made, and declared to be the contract of this corporation, so far as this corporation is a party thereto and concerned therein.

Resolved further, That the president and secretary be, and they are hereby, authorized to sign and countersign said contract respectively, and to affix thereto the corporate seal of this company.

In witness whereof the — Company has caused these presents to be signed by its president and countersigned by its secre-
31 tary and its corporate seal to be hereto affixed this — day of ——, 188–.

(Signed) —— ——, *President.*

Countersigned.

—— ——, *Secretary.*

I, —— ——, secretary of the — Company, do certify that the foregoing is a true copy of the record of the proceedings of ratification of the foregoing contract of the — Company.

(Signed) —— ——, *Secretary.*

32 *Exhibit Marked "B," Annexed to Petition, Being a Modification of an Agreement Made Between Mr. C. P. Huntington and Mr. Jay Gould. Filed April 11th, 1888.*

At a meeting of the board of directors of the — Company, held in — on the — day of ——, 1885, the following resolution was adopted:

Whereas C. P. Huntington, acting on his own behalf and on behalf of his associates and certain railroad companies as therein named, and Mr. Jay Gould, acting on his own behalf and on behalf of his associates and certain railroad companies as therein named, heretofore entered into an agreement bearing date November 26th, 1881, and have since entered into an agreement, dated the 18th day of Februry, 1885, modifying such former agreement, such agreement and modification being as follows:

Modification of an agreement made between Mr. C. P. Huntington, acting on his own behalf and on behalf of his associates and certain railroad companies as therein named, and Mr. Jay Gould, acting on his own behalf and on behalf of his associates and certain railroad companies therein named, dated November 26th, 1881:

It is this the 18th day of February, eighteen hundred and eighty-five, agreed by and between the said parties—

That the sixth article of said agreement —, and the same is hereby, modified and changed as follows:

33 In lieu of the division prescribed *of* the first paragraph of the subdivision VI of said agreement it is agreed that each road shall be entitled to reserve and retain to itself sixty per cent. of its gross earnings on the business referred to as the cost of doing the same, and the balance, forty per cent., shall be divided as follows:

In respect to the New Orleans traffic, the Galveston, Harrisburg, and San Antonio Railway Company and its connections shall be entitled to one-half of such balance and the Texas and Pacific Railway Company and its connections to the other half thereof.

In respect to the Galveston traffic, the Galveston, Harrisburg and San Antonio Railway Company and its connection shall be entitled to two-thirds of such balance and the Texas and Pacific railway and its connections shall be entitled to the other one-third thereof, and the foregoing provisions shall be applicable to and include the earnings between New Orleans or Galveston and El Paso or the junction on business carried from or to New York by the steamers of the Morgan line, and also all business, without any exceptions, to, from, or through New Orleans or Galveston and junction or El Paso, including steamship business via Morgan city, Goolesboro', Algiers, or other points included in the port of Orleans, provided herein that all grain business originating on the Southern Pacific line may be carried by the Galveston, Harrisburg and San Antonio Company and its connections, and all earnings therefrom shall belong to the roads carrying the same, unless the through rate therefor from the original point of shipment to New Orleans and Galveston exceed four and one-half mills per ton per mile, in which case the excess, but only the excess, above four and one-half mills per ton per mile shall be divided between the Galveston, Harrisburg and San
Antonio Railway Company and its connections and the Texas
34 and Pacific Railway Company and its connections according
to the proportion above prescribed.

It is a part of the agreement of the parties hereto that, in consideration of the premises, the said party of the second part and his associates, and the companies on whose behalf he executed the said agreement of November 26th, 1881, release the said party of the first part and his associates, and the companies on whose behalf he executed such agreement, from all claims to November 1st, 1884.

That the eleventh article of said agreement shall be, and the same is hereby, modified and changed as follows:

In lieu of the payments to be made under subdivision of said agreement it is agreed that for all business which may be conducted over the line of the Galveston, Houston and Henderson railroad for or on behalf of or at the request of the Galveston, Harrisburg and San Antonio Railway Company and the Texas and New Orleans Railroad Company and the Houston and Texas Central Railway Company or either of them the said Galveston, Harrisburg and San Antonio Railway Company and the Texas and New Orleans Railroad Company and the Houston and Texas Central Railway Company or one of them shall pay to the Galveston, Houston and Henderson Railroad Company such proportionate part of the accruing interest of the two million dollars of outstanding five per cent. bonds of said Galveston, Houston and Henderson Railroad Company, and the cost of operation, maint*ai*nance, renewals, and taxes, as the business conducted over such road for or on behalf of or at the request of the Galveston, Harrisburg and San Antonio Railway Company and the Texas and New Orleans Railroad Company and the Houston and Texas Central Railway Company or either of

them shall bear — the whole business conducted over said
35 road, and that the same proportionate part of all earn-
ings accruing from the use and operation of said road over the above amounts paid for such accruing interest on said bonds, and such cost of operation, maintenance, renewals, and taxes shall be paid over by the Galveston, Houston and Henderson Railroad Company to the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, and the Houston and Texas Central Railway Company jointly or, if any of them should so desire, severally in the same share or proportion in which they should have respectively contributed to the payment of such interest and such cost of operation, maintenance, renewals, and taxes, it being understood and agreed that the Galveston, Houston and Henderson Railroad Company will conduct all of the business offered to it for the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, and the Houston and Texas Central Railway Company or either of them or their successors or assigns, or which the said last-mentioned company or either of them may acquire or control, promptly and without discrimination and in time and manner of its own traffic, or, if the said last-mentioned companies or either of them should elect so to do, permit them or it to conduct such business with their or its own engines and trains, and to use therefor all facilities owned or controlled by or in use for the Galveston, Houston and Henderson Railroad Company, in which case all the cost incurred in so conducting the business shall be included in the cost of the operation, maintenance, renewals, and taxes, to be paid proportionately by all parties whose business is conducted over said roads.

It is understood and agreed that all the railroad companies
36 on whose behalf such original agreement was made and the
railroad companies above named shall use the Galveston, Houston and Henderson railroad for the transportation of all such merchandise to which it is adapted, except cotton and oil-cake, which may be sent by water routes when destined for points beyond Galveston if the railroad is unable to properly transport it.

The cost, if any, and all betterments and additions to the Galveston, Houston and Henderson railroad for its terminal facilities which may be agreed upon between the said Gould and the said Huntington shall be included in the cost of operation, maintenance, and renewals hereinbefore mentioned and divided among the various parties accordingly.

The chief administrative officer of the Galveston, Houston and Henderson railroad and the agent at Galveston shall be the persons agreed upon by said Gould and said Huntington or their successors respectively under this agreement.

All business heretofore done over the Galveston, Houston and Henderson railway by or for either of the other companies above named shall be settled for according to the principles hereinbefore prescribed.

The foregoing agreements modifying the original contract of November 26th, 1881, shall go into effect and be in force — and after

this date, and the said parties agree respectively that the foregoing modifications shall be submitted to the several boards of directors or executive committees of the corporations on whose behalf they execute such contract respectively, and that the same shall be accepted, adopted, ratified, and confirmed, made, and declared by several boards of directors or executive committees to be the act and contract of their respective corporations, so far as the same affects them
37 respectively, and thereupon each corporation shall deliver to each of the others of such corporations certified copies of its proceedings in the premises, signed by the president or vice-president and countersigned by the secretary thereof and sealed with its corporate seal, within ninety days from the date thereof.

Dated and signed the 18th day of February, 1885.

(Signed) C. P. HUNTINGTON. [L. S.]
" JAY GOULD. [L. S.]

And whereas it is considered and believed that the said agreement of modification is just, fair, and reasonable and for the benefit and advantage of this corporation,

It is therefore resolved, That the said agreement of modification be, and the same is hereby, accepted, ratified, and confirmed and made and declared to be the act and contract of this corporation so far as the same affects it.

Resolved further, That the president and secretary be, and they are hereby, authorized to sign and countersign said agreement of modification respectively and to affix thereto the corporate seal of this company.

In witness whereof the — Company have caused these presents to be signed by its president and countersigned by its secretary and its corporate seal to be hereunto affixed this — day of ——, 1885.

(Signed) —— ——, *President.*

Countersigned.

—— ——, *Secretary.*

I, —— ——, secretary of the — Company, do hereby certify that the foregoing is a true copy of the record of the proceedings of ratification of the foregoing agreement by the — Company.

38 (Signed) —— ——, *Secretary.*

39 *Exhibit Marked " C," Annexed to Petition, Being a Decree in T. & P. Railway Co. versus Southern Pacific of New Mexico, 3rd Judicial District of New Mexico. Filed April 11th, 1888.*

In the District Court of the Third Judicial District of New Mexico.

TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiffs,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY (of New Mexico), Defendant.

This cause coming on to be further heard at this term, the plaintiff, The Texas and Pacific Railway Company, appeared by G. W.

Spaulding, its attorney, and the defendant by Catron & Thornton, its counsel; whereupon the defendant filed, by consent of the court and counsel, an amendment to its answer making the following parties to this cause, to wit, the Southern Pacific Railroad Company (of Arizona), the Southern Pacific Company (of California), the Los Angeles and San Diego Railroad Company, and the Central Pacific Railroad Company; and thereupon the said — entered an appearance for each of the said additional parties above named.

40 District Court of the Third Judicial District of New Mexico.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
THE SOUTHERN PACIFIC COMPANY (of New Mexico), The Southern Pacific Railroad Company (of Arizona), The Southern Pacific Railroad Company (of California), The Los Angeles and San Diego Railroad Company, and The Central Pacific Railroad Company.
} Final Decree.

This cause coming on to be further heard at this term, the Texas and Pacific Railway Company by G. W. Spaulding, its attorney, and the Southern Pacific Railroad Company (of Arizona), the Southern Pacific Railroad Company (of New Mexico), the Southern Pacific Railroad Company (of California), the Los Angeles and San Diego Railroad Company, and the Central Pacific Railroad Company appeared by Catron & Thornton, their counsel.

And it appearing to the court that the parties to this cause
other than the Los Angeles and San Diego Railroad Co. and
41 the Central Pacific Railroad Company had, under date of
the 26th of November, A. D. 1881, made and entered into
an agreement in respect thereto, a copy of which is hereto attached, marked "A" ("meaning the 'Gould-Huntington agreement;'")

And it appearing that said agreeement had been ratified and confirmed by all of the corporations on whose behalf it had been executed, and by all of the parties hereto, and by consent of each of the parties to the cause hereinbefore named, it was ordered, adjudged, and decreed as follows:

That the entire railway of the Texas and Pacific Railway Company and the entire railroad of the Southern Pacific Company of New Mexico, and of the Southern Pacific Railroad Company of Arizona, and the Southern Pacific Railroad Company of California, and the Los Angeles and San Diego Railroad Company, and the Central Pacific Company between Goshen and San Francisco shall each be operated and used in perpetuity for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line, and the gross earnings from all through business passing from one of said company's railways to the railway lines of the other shall be divided between them in proportion to the distance hauled by each, with equitable and reasonable allowances for terminal expenses, not to exceed the current charges on similar business handled by the Union Pacific railway and the Central Pacific Railroad Company at San Francisco, and that no terminal charges elsewhere, by either of said parties hereto, shall exceed those at San Francisco.

42 And it further appearing to the court that the said Texas and Pacific Railway Company has, among other things, conformably to the said agreement, duly executed an instrument to the Southern Pacific Railroad Company (of New Mexico), whereby it has granted, remised, released, and quitclaimed all its right, title, interest, claim, and demand and estate in and to the way, right of way, and railroad constructed by the Southern Pacific Railroad Company of New Mexico (the right and title to which, in New Mexico, is in controversy in this suit), and also in and to certain lands of the said Texas and Pacific Railway Company, a copy of which said instrument is hereto annexed, marked "B," and which describes the premises thus granted, remised, released, and quitclaimed as follows:

All its rights, title, and interest, estate, claim, and demand of, in, and to all that certain strip of land commencing on the boundary line between the Territories of Arizona and New Mexico at a point where a certain railroad constructed by the Southern Pacific Railroad Company (of Arizona) and the Southern Pacific Company (of New Mexico) crosses the same, thence in a generally eastern direction across said Territory of New Mexico to the middle thread of the Rio Grande, at or near El Paso, where the said railroad of the Southern Pacific Company of New Mexico crosses the said Rio Grande, said piece or parcel of land being two hundred feet in width—that is to say, one hundred feet on each side of the railroad so as aforesaid built by the said Southern Pacific Railroad Company of New Mexico, measuring from the middle of the line or thread between the track or rails of said railroad company, with all the right, title, and interest of the said Texas and Pacific 43 Railway Company of, in, and *for* all lands which have been occupied and are now occupied by the said Southern Pacific Railroad Company of New Mexico or that said company may desire to occupy hereafter for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not exceeding in amount twenty acres for each station, to the extent of one station for each ten miles of said road, together with all — singular the tenements and hereditaments and appurtenances thereunto belonging or anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all estate, right, title, interest, property, possession, claim, demand whatsoever, as well in law as in equity, of the said "the Texas and Pacific Railway Company" of or to the above-described premises and every part thereof, with the appurtenances:

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said "the said Southern Pacific Company (of New Mexico)," its successors and assigns, forever: Provided, however, that this conveyance is not to affect the rights, privileges, and easements in, to, and over said above-described premises, reserved, conceded, and established to and in favor of the said grantor by said agreement of November 26, 1881, and the said decrees.

And it further appearing to the court that the said Texas and Pacific Railway Company has, conformably to said agreement, duly executed an instrument to the Southern Pacific Company of Arizona, whereof it made like grants, remises, releases, and quitclaims in respect of its right, title, interest, claim, demand, and estate in and to the way, right of way, and railroad constructed by the Southern Pacific Railroad Company of Arizona, the right and title to which in Arizona is in controversy in the district 44 court for the second district of Arizona, sitting in the county of —, and also its right, title, interest, and estate in and to certain lands of the Texas and Pacific Railway Company in Arizona, as will more perfectly appear by reference to said instrument.

And — further appearing to the court that a like instrument was executed by the Texas and Pacific Railway Company to the said Los Angeles and San Diego Railroad Company, a corporation of the State of California.

And it further — that each of the said instruments was executed by the Texas and Pacific Railway Company for the considerations therein severally stated, and also in consideration that the said rights, privileges, and easements hereinbefore mentioned should be reserved, conceded, and established as a perpetual right, privilege, and easement appertaining to the railroad of each said companies above named, parties to this suit, in and over the road or roads of the other, on consideration thereof and by consent of each of the parties to this suit it is also hereby ordered, adjudged, and decreed that the foregoing right, privilege, and easement appertaining to the railroad of the Texas and Pacific Railway Company in and over the railroad of the Southern Pacific railroad of New Mexico and in and over the railroad of the Southern Pacific Railroad Company of Arizona and the Southern Pacific Company of California and the Los Angeles Railroad Company throughout their entire extent and the Central Pacific railroad between Goshen and San Francisco, with the limitation hereinafter stated, and a reciprocal right, privilege, and easement appertaining to each of the railroads of the com- 45 panies last named in and over the railroad of the Texas and Pacific Railway Company throughout its entire extent is hereby decreed and established and by the consent of parties it is accordingly ordered, adjudged, and decreed and established as a right, privilege, and easement appertaining to the way, right of way, or railroads of said companies into and over the way, right of way, and railroads of the other; that each of the said railroads shall be used and operated by the said companies respectively, their successors and assigns in perpetuity, for all purposes of communication of travel and transportation, so far as the public and Government are concerned, as one continuous line, and that the gross earnings from all through business (meaning by "through business" all traffic carried to and from terminal, common, or competitive points—any point upon the railways of the parties to said agreement dated November

26th, 1881, that may be reached directly or indirectly by any railroad competitive to either of said roads is a "competitive point") passing from one of said companies' lines to the railway lines of the other shall be divided between them in proportion to the distance hauled by each, with equitable and reasonable allowances for terminal expenses as aforesaid: Provided, and it is expressly considered, ordered, and adjudged, that, except as to the rights, privileges, and easements aforesaid, the said Texas and Pacific Railway Company has no right, title, estate, claim, or demand at law or in equity or in the way, right of way, and railroad, with its appurtenances, constructed by the Southern Pacific Railroad Company of New Mexico, in the Territory of New Mexico, or to the way and railroad, with its appurtenances constructed by the Southern Pacific Railroad Company of Arizona, in the Territory of Arizona.

The aforesaid decree is made to carry out the provisions in this behalf of said agreement dated November 26, 1881, which is hereby made a part of this decree, and by consent of the parties and
46 upon consideration by the court is hereby ordered to be binding upon each and all of the parties hereto in all its stipulations and agreements as therein shown, and said decree does not affect or otherwise interfere with the provisions of the agreement.

It is further ordered, adjudged and decreed that when the Southern Pacific Railroad Company of California is completed by a continuous line of its own from Yuma to San Francisco, without the intervention of a ferry, that this decree shall cease to operate, either for or against the Central Pacific Railroad Company.

It is further ordered, adjudged, and decreed that the injunction order and the order for the appointment of a receiver, heretofore made herein, shall be vacated and set aside, and that each party hereto shall pay the costs made by it, and each party hereto in open court waives any right of appeal herefrom and releases all errors herein.

It is further considered, ordered, and adjudged that the several parties to this suit be allowed to withdraw all moneys deposited or paid into court by them respectively, pursuant *or* orders of the court herein.

47 *Exception. Filed May 19th*, 1888.

Civil District Court for the Parish of Orleans.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
SOUTHERN PACIFIC COMPANY.
No. 23755. Division "D."

Now into court comes The Southern Pacific Company, made defendant herein, and excepts to plaintiff's petition, and for cause of exception shows—

That the agreement annexed to plaintiff's petition, marked "Exhibit A," and the modification thereof annexed to said petition, marked "Exhibit B," contain a number of separate and distinct and independent objects and considerations and different obligors and obligees; that the contract to pool earnings between El Paso, or "the junction," and New Orleans and Galveston, contained in submission VI of said agreement "A," which said pooling contract plaintiff seeks to enforce in this suit, is a contract complete in itself, having as its sole consideration the undertakings which the parties thereto mutually assumed in said subdivision and modification thereof.

Now defendant and exceptor is informed and believes that the said pooling contract was made in good faith by the parties thereto, for the purpose of securing to themselves remunerative rates for the traffic therein referred to; but it is advised that the said pooling contract is contrary to public policy, and therefore null and void, and did not nor does confer and is incapable of conferring upon any of the parties to it any right which this court can recognize or enforce.

48 And defendant and exceptor further shows that the Galveston, Harrisburg and San Antonio Railway Company, which is a principal and essential party to the aforesaid pooling contract and to all whose rights and obligations thereunder plaintiff alleges the defendant has succeeded, is a corporation created and organized by special act of the Legislature of the State of Texas and is subject to the laws of said State; that the Texas and New Orleans Railroad Company, another essential party to said pooling contract, is also a corporation created and organized by a special act of the Legislature of the State of Texas and subject to the laws of said State; that said pooling contract, as shown by its own terms, was and is principally to be performed and the traffic subject to it principally to be carried within the State of Texas; that, as far as it imposed any obligations upon the said Galveston, Harrisburg and San Antonio Railroad Company or the said Texas and New Orleans Railroad Company, they were and are to be entirely performed within the State of Texas; that the constitution of the State of Texas, in force at the time *of* said agreements sued on were entered into and now in force, being the constitution ratified on February 15th, 1876, and taking effect April 18th, 1876, expressly prohibits, in article X, section V, any railroad or other corporation or the lessees, managers, or purchasers of any railroad corporation from consolidating with, leasing, purchasing, or in any way controlling any railroad corporation owning or having under its control a parallel or connecting line; that defendant and exceptor annexes hereto, as part of this exception, a map marked Ex. "X," which shows by separate designation thereon the several line or railroad companies between "El Paso," or "the junction," in the State of Texas, and New Orleans, Louisiana, or Galveston, Texas, referred to in the contract sued on as existing at the date of said contract and which were existing at the date of the commencement of this action; and it avers that, while it is informed and believes that the said pooling contract was made in good faith by the parties thereto for
49 the purpose of securing to themselves the remunerative rates for the traffic therein referred to, it is advised that said pool-

ing contract, by reason of the aforesaid provisions of said constitution of the State of Texas and for other causes and reasons to be presented in argument, did not nor does confer and is incapable of conferring upon any — to it any right which this court can recognize or enforce, and that this court should not enforce the performance of such contract within or in respect to the traffic performed within or in the State of Texas.

And for further exception to plaintiff's petition defendant shows that by a statute of the United States entitled "An act to regulate commerce," approved February 4th, 1887, being chapter 104 of the second session of the 49th Congress, in the year 1887, it was expressly declared and enacted in section 5 of said act that it shall be unlawful for any common carrier engaged in the interstate commerce to enter into any contract or agreement or combination with any common carrier or carriers for the pooling of freights or to divide between them the aggregate proceeds of earnings of such railroads or any portion thereof, and that in any case of an agreement for the pooling of freights each day of its continuance shall be deemed a separate offense, and section 10 of said act provides that any disobedience to said act shall be deemed a misdemeanor and punishable by a fine not to exceed $5,000 for each offense; that said act by its terms took effect sixty days after February 4th, 1887.

Now defendant and exceptor avers that said pooling contract, contained in subdivision VI of said agreement "A" as modified by said agreement B, is in respect to its parties and its nature 50 and terms — in all other respects included within — for the prohibition contained in the aforesaid statute of the United States known as the "interstate-commerce act;" that if said pooling contract ever had any legal existence the interstate-commerce act put an end to its legality and rendered its continued existence after April 3rd, 1887, unlawful, and hence, in contemplation of law, impossible, and defendant specially pleads said section 5 of said interstate-commerce act as a bar to that portion *to* plaintiff's demand which seeks to compel defendant to carry out said pooling contract after April 3rd, 1887, and it specially sets up the right and claims the protection afforded it by said law of the United States, and prays that — portion of plaintiff's demand which seeks to compel defendant to account for its gross earnings on business done since April 3rd, 1887, and to pool the same be rejected, and that the said pooling contract or contract for the division of earnings contained in subdivision VI of said agreement "A" and as modified by agreement "B" be declared null and void.

And should these objections be overruled and defendant required to plead or answer to plaintiff's demand on its merits, then defendant further excepts to the petition on the ground that its allegations are too vague and indefinite to enable defendant to safely and intelligently prepare its defense; that defendant is entitled to a more detailed statement of plaintiff's claim, showing how much plaintiff claims for each month, and defendant is also entitled to be informed what errors and objectionable items in the monthly accounts alleged to have been rendered plaintiff intends to claim to exist, and plaintiff should be required to allege the facts upon which it intends to show that the whole amount claimed is due to it and not to any of the other parties to the said agreements "A" and "B."

51 And defendant further excepts *that* the portion of plaintiff's petition which claims of defendant the sum of $5,829.49 on the ground that the nature and origin of said alleged indebtedness is not set forth with sufficient definiteness and particularity to enable defendant to safely and intelligently prepare its defense thereto.

And defendant and exceptor says that it desires leave to further plead or answer said petition should its exceptions be overruled.

Wherefore defendant prays that its exceptions be maintained; that the pooling contract or the contract for the division of earnings contained in subdivision VI of the Gould-Huntington agreement entered into on November 26th, 1881, as modified by the modification of said agreement made February 18th, 1885, be declared null and void and plaintiff's suit be dismissed with costs, and in the event that its exceptions be overruled it prays for leave and time to further plead to or answer the petition as it may be advised, and it further prays for general relief.

(Signed) LEOVY AND BLAIR,
Att'ys for Defendant and Exceptor.

52 *Testimony on Exception.*

STATE OF LOUISIANA:

Civil District Court, Parish of Orleans.

TEXAS AND PACIFIC RAILWAY CO. *et als.* *vs.* SOUTHERN PACIFIC COMPANY. } No. 23755. Division D. Civil District Court, Parish of Orleans.

Note of evidence and testimony on exception, November 9th, and filed December 1, 1888.

Present: J. P. Blair, for defendant and exceptor; W. W. Howe, for pl't'ffs in suit.

Counsel for defendant, plaintiff in exception, offers and introduces in evidence a duly certified copy of the charter and act of incorporation of the Southern Pacific Railway Company, being an act of the General Assembly of the Commonwealth of the State of Kentucky approved March 17th, 1884, being chapter 403 of the acts of that State for the year 1884.

Counsel for defendant, plaintiff in exception, also introduces and offers in evidence a duly certified copy of the acts of the Legislature of the State of Texas incorporating the Texas and New Orleans Railway Company, being an act entitled and approved as follows:

53 "An act incorporating the Sabine and Galveston Bay Road and Lumber Company," passed September the 1st, 1856; "An act for the relief of the Sabine and Galveston Bay — and Lum-

ber Company," approved February 13th, 1858; "An act amendatory and supplemental to an act incorporating the Sabine and Galveston Bay Road and Lumber Company," passed September 1st, 1856, approved September 24th, 1859

Counsel for defendant, plaintiff in exception, also introduces and offers in evidence a duly certified copy of an act of the Legislature of the State of Texas incorporating the Galveston, Harrisburg and San Antonio Railway Company, entitled and approved as follows:

"An act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company," approved February 10th, 1850; also "An act *mandatory* to an act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company and to other special acts relative to said company," passed July 27th, 1870.

Counsel for defendant, plaintiff in exception, also introduces and offers in evidence article 10 of the constitution of the State of Texas, being the constitution ratified in 1876, and especially section 5 of said constitution.

It is agreed that the constitution of the State of Texas may be referred to in the lower court and in the supreme court in case of appeal in the printed volume of the laws and statutes of the State of Texas, and that it need not be copied in the transcript of appeal.

54 Counsel for defendant also introduces and offers in evidence in support of the exception the charter of the Morgan's Louisiana and Texas Railway and Steamship Company, being act 37 of the acts of the Legislature of the State of Louisiana for the year of 1837; and it is agreed that this charter of the Morgan Company, being a legislative charter, need not be copied in the record, but may be referred to in the printed form as found in the published acts of the Legislature of the State and in the lower court and in the supreme court in case of appeal.

Counsel for defendant, plaintiff in exception, also introduces and offers in evidence the charter of the Louisiana Western Railroad Company, being act No. 21 of the acts of the General Assembly of the State of Louisiana for the year 1878, of the extra session of said year, and the same agreement is made with reference to the use of the printed acts of the Legislature containing said charter without having this said charter copied in the record.

55 C. C. Gibbs, sworn for defendant (plaintiff in exception).

Examination-in-chief by Mr. Blair:

Mr. Blair:

Q. What is your name, age, residence, and occupation?

A. My name is Charles C. Gibbs; I live in San Antonio, Texas; my age is forty-five years, about, and a few months; I am general agent of the Southern Pacific Company.

Q. How long have you been connected with the Southern Pacific Company?

A. Three years and eight months.

Q. Before that time what was your occupation?

A. I was connected with the Galveston, Harrisburg and San Antonio Railway Company.

Q. How long were you connected with that company?

A. Thirteen years.

Q. Then for fifteen years you have been engaged in the traffic department of Texas railroads?

A. Yes.

Q. Are you familiar with the general movement of freight and traffic between New Orleans and Galveston and New Orleans and El Paso?

A. Yes.

Q. Does it extend back to November, 1884?

A. Yes.

Q. Will you explain to the court what railroad companies are concerned in the transportation of freight and passengers between New Orleans and El Paso; what two systems of railroad are concerned in that traffic?

A. The Southern Pacific Company is one and the Texas and Pacific is the other.

56 Q. Are there any other railroads in competition with them for the traffic between New Orleans and El Paso?

A. No.

Q. How long has that been the case?

A. I don't consider that there ever has been any other competition.

Q. Can you state that as a fact?

A. Yes.

—. They are, then, the sole competitors for the carrying trade between New Orleans and El Paso?

A. Yes.

—. And have been since the construction of these roads?

A. Yes.

Q. State to the court what roads the Southern Pacific system between New Orleans and El Paso is composed of.

A. The Morgan's Louisiana and Texas Railway Company from New Orleans to La Fayette; the Louisiana Western railroad from La Fayette to Orange; the Texas and New Orleans railway from Orange to Houston; the Galveston, Harrisburg and San Antonio from Houston to El Paso.

Q. The two last named roads, the Texas and New Orleans Railway Company and the Galveston, Harrisburg and San Antonio railway, are so situated in what State?

A. They are entirely in the State of Texas.

Q. What connection exists between those roads and the Southern Pacific Company?

A. They are leased roads.

Q. They are leased roads by the Southern Pacific Company?

A. Yes.

Q. Do you know whether those roads preserve their separate corporate existence?

A. I think they do.

57 Q. Have they a president, secretary, and other officers of their own?

A. Yes.

Q. Of what roads is the Texas and Pacific system composed between here and El Paso—between New Orleans and El Paso?

A. The New Orleans Pacific and the Texas and Pacific.

Q. The New Orleans Pacific extends between what points?

A. From New Orleans to Shreveport.

Q. And the Texas and Pacific extends the rest of the way to El Paso?

A. Yes.

Q. Is there any portion of the railway between here and El Paso—between New Orleans and El Paso—that is jointly operated by the Texas and Pacific and the Southern Pacific systems?

A. Yes.

Q. What portion is jointly operated by these two systems?

Q. There is a portion between Sierra Blanca and El Paso, a distance of ninety-three miles.

Q. With that exception they are separate and distinct lines?

A. Yes.

It is admitted, for the purpose of this exception, that the New Orleans Pacific railway has been sold to the Texas and Pacific Railway Company, and hence the Texas and Pacific extends from New Orleans to El Paso.

Witness: I was only speaking from my own knowledge as I understood it; but I am willing to accept that correction.

Q. Mr. Gibbs, what is the distance, by way of the Southern Pacific, from El Paso to New Orleans?

A. Twelve hundred and nine (1,209) miles.

Q. And what is the distance by the Texas and Pacific railway?

A. Eleven hundred and sixty (1,160) miles.

Q. With the exception of the ninety-three miles of road
58 operated by the two systems jointly what is the relative position of the Southern Pacific Company's railway and the Texas and Pacific railway lines?

A. I regard them as almost parallel and strictly competitive.

Q. What is the relative position of these two Texas roads to the road of the Texas and Pacific road?

A. The Texas and New Orleans railroad and the Galveston, Harrisburg and San Antonio roads.

Q. Yes; what is their relative position to the line of the Texas and Pacific road?

A. They are parallel to the Texas and Pacific and also competitors.

Q. Now, Mr. Gibbs, what railroads are concerned in the moving of traffic and transportation of freight and passengers between Galveston and El Paso?

A. The Southern Pacific line and the Texas and Pacific line also, through their connections.

Q. Are they the sole competitors for the business between Galveston and El Paso?

A. I regard them as such.

Q. You have had considerable experience in Texas *and* the moving of freight and passengers?

A. I have been sixteen years in that business.

Q. Explain the lines that the Southern Pacific Company pass over in moving freight between Galveston and El Paso.

A. The Galveston, Houston and Henderson road to Houston; the Galveston, Harrisburg and San Antonio road from Houston to El Paso, and also the Galveston, Colorado and Santa Fé road to Rosenburg Junction, and hence to El Paso over the Galveston, Harrisburg and San Antonio road; those two connections from the Southern Pacific Company's lines between Galveston and El Paso.

59 Q. Now, over what road is the traffic carried on by the Texas and Pacific line between Galveston and El Paso?

A. Over the Galveston, Houston and Henderson railroad from Galveston to Houston, and over the International and Great Northern railway from Houston to Minneola, and over the Texas and Pacific thereto to El Paso.

Q. Is any part of the lines of the two systems between Galveston and El Paso operated jointly by the two roads?

A. Yes.

Q. What part of the distance between Galveston and El Paso is operated by the two roads?

A. The distance between Houston and Galveston, fifty miles, and the distance between Sierra Blanca and El Paso, ninety-three miles.

Q. The rest of the distance is operated on separate roads?

A. Yes.

Q. What is the distance between Galveston and El Paso?

A. By the Southern Pacific it is eight hundred and ninety-eight miles (898).

Q. And what is the distance between Galveston and El Paso over the Texas and Pacific line?

A. I believe it is over a thousand miles—a thousand and seventeen miles, the prorating distance.

Q. Suppose people in Galveston want to send traffic over El Paso to the Pacific coast, over what system would they have to send it?

A. Well, until recently, over the Southern Pacific line or over the Texas and Pacific; now, can also send it by the Atchison, Topeka and Santa Fé route; but, in fact, that line — only been in existence about a year.

Q. Now, as an expert, from your experience in the moving of
freights in Texas, would you call the Texas and Pacific rail-
60 road and its system parallel to and competing with the line
of the Southern Pacific and its system of lines?

A. Well, yes, sir; practically they are. Of course there are some distances where they are not parallel.

Q. But, as — the New Orleans and El Paso traffic is concerned, would you call them parallel?

A. They are distinctly, and, as I understand it, parallel.

Q. And competing lines?

A. Certainly so.

Q. With regard to certain points on these roads, where they are some distance apart, I understand you to say they are not competing.

A. There are points where they are not competing; yes, sir.

Q. Mr. Gibbs, have you examined this map annexed to the exceptions and marked Exhibit "X?"

A. I have.

Q. Can you state whether it substantially and practically represents the positions of the Texas and Pacific system and the Southern Pacific system relatively and whether it is correct?

A. It practically shows the physical location of the lines. There may be a little variation, but I don't regard that as anything; it is *subsequently* correct.

Q. During the time that you have been connected with the Galveston, Harrisburg and San Antonio road and the Southern Pacific road can you say whether there has been any attempt at a physical division of the freight between the two systems of lines to El Paso?

A. There has been none, to my knowledge.

Cross-examined by Mr. Howe:

Q. I understand you, Mr. Gibbs, the Southern Pacific Company, in running from El Paso to Galveston, has a joint track with the Texas and Pacific for ninety-three miles to Sierra Blanca.

61 A. Yes.

Q. And from there to Houston it passes over what road?

A. By the Galveston, Harrisburg and San Antonio road.

Q. And from Houston to Galveston it passes by the Galveston, Houston and Henderson road?

A. That is one line, and, as I stated, there is another line running by the way of Rosenberg Junction.

Q. Does it go round by the way of Austin?

A. No; that is sixty-six miles.

Q. That is a very short distance out of the way?

A. Yes.

Q. But the general cause is such as I have described?

A. At present; yes, sir.

Q. In going from El Paso to New Orleans the Southern Pacific line goes on a joint track with the Texas and Pacific line for ninety-three miles to Sierra Blanca; thence by Galveston, Harrisburg and San Antonio railway to Houston; thence by the Texas and New Orleans railway to Orange; thence by the Louisiana Western to La Fayette, and from there to New Orleans by the Morgan road?

A. Yes; that is right.

Q. Now, will you allow me to ask you how it is that you say that the Texas and Pacific line, running from El Paso by the way of, say, Fort Worth, Dallas, Shreveport, and Alexandria to New Orleans, is a line parallel and competing with the Southern Pacific Company's line from El Paso to Galveston? As I took them on the map they seem to stand at a considerable of an angle to each other, and I don't see that the Southern Pacific connects with the line of the Texas and Pacific.

A. I do not say that they are parallel. If you look at it from that
standpoint, then I am wrong; but, as the roads show on
62 the map, they are practically parallel, in my judgment, the
way I look at it.

Q. Do you mean to say that the Texas and Pacific line runs to Galveston?

A. Through their connections they do.

Q. Do they own the International and Great Northern railway?

A. I don't know. I think not.

Q. You are right; they do not.

A. I never stated that they did.

Q. Take a point directly north of Galveston—Longview, for instance, or Marshall. That is in the same longitude as Galveston?

A. About.

Q. The Texas and Pacific Company has no line from Marshall to Galveston or from Longview to Galveston or from Dallas or Fort Worth to Galveston?

A. Only through their connections.

Q. What you mean to say, I suppose, is that they have arrangements with other lines which enable them to send cars over them?

A. Yes.

(By Mr. Blair:)

Q. State what roads they have arrangements with that enable them to send cars to Galveston.

A. The International and Great Northern and the Galveston, Houston and Henderson Railroad Company.

(By Mr. Howe:)

Q. Then your idea is that where there are three sides to a triangle and two roads constituting the sides of the triangle are connected with the base of the triangle that they are parallel roads?

A. Practically so.

Q. Then does it not come to this, that in the State of Illinois,
which is gridironed with railroads, — in that State is parallel with
every other road in that State?
63 A. If they run from one common point to another and are
competing for the freight they are.

Q. If they are so connected as to form triangles or parallelograms, nevertheless they become parallel the moment you can run freight by them to a common point?

A. If it is considered a direct line; yes; I think so. Of course, you can get to California from here by way of Chicago, and I would not consider that a direct line. I don't think freight and passengers would move that way.

Q. I suppose it would be practicable to send freight to California from New Orleans via St. Louis?

A. Yes.

Q. And you could send it by way of Kansas City?

A. Freight could go that way, but the rate would be decidedly against that route.

Q. They build railroads so rapidly that I cannot keep up with them; but is there not some other through route to San Francisco other than by the Southern Pacific and the Texas and Pacific?

A. I don't know of any just now.

Q. Would it be practicable to go by the way of Dallas, Fort Worth, and Denver?

A. I don't think you could reach San Francisco by that route in as short time as by the Southern Pacific or the Texas and Pacific. That is not regarded as a California route in any sense.

Q. Since the Atchison, Topeka and Santa Fé roads have been built I believe they have connections with Galveston also?

A. Yes.

Q. Does that make another line from Galveston to El Paso competing for the freight?

A. Practically not. You can get there by that route, but it forms
a complete triangle.
64 Q. Do they compete for that trade?
A. They don't undertake to take any freight to El Paso, as far as I have been able to find out.

Q. What would you say of this route from New Orleans to California by the Mississippi Valley road to Vicksburg, thence by the Vicksburg, Shreveport and Texas to Shreveport, and thence by the Texas and Pacific?

A. You could get there in that way.

Q. It would not be much longer than by the Southern Pacific?

A. I don't know the distance. I have not figured it out.

Q. What would you say, suppose freight was sent by the Illinois Central to Jackson and by the way of the Vicksburg and Meridian to Vicksburg, and thence to Shreveport, and from there by the Texas and Pacific road?

A. You could not get freight that route. I think the rates would be decidedly against it. There has been no rate made by way of Vicksburg to the Pacific coast, as I understand. I never heard of it.

Q. It would not be much longer than the route taken now?

A. I don't think it would be a great deal longer, but I don't think the rates would be satisfactory.

Q. Suppose you took the Illinois Central to Jackson, thence by the Vicksburg and Meridian to Vicksburg, and from there to Shreveport, on the Texas and Pacific line to El Paso?

A. You could get there in that way.

Q. Would you consider that a parallel route to the Southern Pacific?

A. I would not.

Q. If there was no other railroad from New Orleans to Shreveport, but there was a railroad, as there formerly was, completed from New Orleans to Jackson, from Jackson to Vicksburg, and from Vicks-
burg to Shreveport, and then by the Texas and Pacific to El
65 Paso, would you then consider that route to be parallel to the
route of the Southern Pacific?

A. Let me understand that question.

Q. Imagine that the New Orleans and Pacific had never been built to Shreveport?

A. I cannot tell you what the condition would be in such a case as that. I don't know what might have happened if that road had not been built.

Q. Suppose you imagine that the New Orleans and Pacific railway had not been built from New Orleans to Shreveport, but you have the Texas and Pacific reaching from El Paso to Shreveport, and you have the Vicksburg, Shreveport and Texas road to Vicksburg, and you have the Mississippi Valley road from Vicksburg to New Orleans. Would you consider that a parallel to that of the Southern Pacific?

A. Well, I should think it would be if the circumstances existed, but I don't think any effect would go that way.

Q. Would your feelings in the matter influence you *adversary of* your route?

A. No, sir.

Q. You would take a scientific, comprehensive view of the matter?

A. I would take a business man's view of it.

Re-examined by Mr. Blair:

66 Q. There is one thing that I want to be particular about: When you speak about the control and ownership of the International and Great Northern line I would like for you to fix some date and to state whether you are speaking from your own knowledge or from general hearsay.

A. I would hardly make oath to hearsay. I reckon I know it from personal knowledge.

Q. When was it that the Missouri Pacific system was controlling and operating the Texas and Pacifie line?

A. I cannot give you the exact date, but, as a matter of fact, it was so. I think it was so up to the time when the road passed into the hands of the receiver. I cannot give you that date.

Q. That was in December, 1885, that the Texas and Pacific went into the hands of the receiver?

A. I don't know the date.

Q. Then your theory of the management and control refers to a time prior to the time when the road went into the hands of a receiver?

A. Yes.

Q. You don't now remember that it was about three years ago next December when the receiver took possession?

A. I don't remember. I know very well this: that pending this contract and during its existence the Missouri Pacific Company was controlled by the Texas and Pacific road.

Q. Have you any personal knowledge — in which that control was exercised?

A. One general manager controlled all the lines and one traffic manager had charge of the roads.

Q. Was that done by a lease of the Texas and Pacific or by a consolidation with the Texas and Pacific?

67 A. I cannot tell you positively.

Q. Or did it come from the fact that the same parties owned stock in both companies and were interested in both?

A. I don't know; but it was all called the Missouri Pacific system; we all knew that.

Q. Then you really have no personal knowledge of the details of that control exercised, as you say, by the Missouri Pacific over the Texas and Pacific; whether it was by lease or by consolidation or whether it was the result of friendly harmony?

A. I have no special knowledge. I never saw the statements.

Q. If I should tell you from my personal knowledge that there were no papers drawn up between the two companies you would not undertake to dispute that?

A. No.

Q. If I should call your attention to the fact that every letter-head used in our office——

Objected — by Mr. Blair as irrelevant and not proper cross-examination. The court overrules the objection as going to the effect rather than to the admissibility of the evidence.

Q. If I were to call your attention to the fact that the letter-heads read, Missouri Pacific Railway system and Texas Pacific system, you would not dispute that fact?

A. No; but I don't think that anybody in Texas disputed the fact that the Missouri Pacific had the lines leased.

Q. Suppose that I should tell you from my own personal knowledge that there was no lease, you would not dispute that fact?

A. I have no right to dispute it.

Q. I know that there is a superstition or belief that there was a lease, but the fact is the ownership of the stock was nearly
68 the same, and they operated in harmony to save expenses. They employed the same managers and freight agents.

Counsel for defendant, plaintiff in exception, objects to this question and all these questions in so far as — purport to state facts not in the record and not testified to by witness.

By Mr. Howe:

Q. You will agree that since the appointment of the receiver the Texas and Pacific Company has been entirely segregated from the Missouri Pacific Company.

A. Yes; as far as my knowledge goes, they had different managers and different traffic agents.

Q. You would not be able to state that there is any connection between them now?

A. Nothing more than friendly connection, such as would exist between other roads not antagonistic.

Q. As a matter of fact, the Texas and Pacific road does not extend from El Paso to Galveston by way of Minneola?

A. I don't think I said so.

Q. The fact is that the Texas and Pacific runs to Minneola, and from there there are connecting routes by which the Texas and Pacific is enabled to send cars to Galveston?

A. That is the fact, but during the existence of the Missouri Pacific Railroad system they had their rates in Galveston to El Paso, and they put all their cars under one management and the rates also.

69 Q. Because the same manager happened to be an officer of both companies?

A. He was the general manager of the whole system.

Q. Don't what is called the Queen and Crescent road, from Cincinnati to New Orleans, and the Illinois Central road, from Cincinnati to Shreveport, don't they make through rates to El Paso?

A. They do by our consent.

Q. For instance, I saw lately a through rate from Stenlenville to Dallas of forty-four cents.

A. Yes; they make those rates by consent of the roads.

Q. Do you consider a road from Stenlenville to Dallas as parallel to the Southern Pacific?

A. Not as it is now understood.

Q. Suppose that one of those enterprising railroad companies in the State of New York made through rates from — to Fort Worth, by the way of the Erie road and over other lines, would the fact that the number of rates made through a number of different lines controlled by different corporations, but all tending in one direction, would that make the route parallel to the Southern Pacific?

A. If they both run in the same direction and to the same point I should say so. For instance, if you will allow me to illustrate, there is a line from Steubenville to Fort Worth over the Texas and Pacific, and there is another line from Steubenville to Fort Worth by way of Houston. I should consider them practically parallel and connecting.

Q. You would hardly consider them parallel geometrically?

A. I don't think they have to be parallel geometrically to be competing and practically parallel.

70 STATE OF LOUISIANA:

Civil District Court, Parish of Orleans.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
SOUTHERN PACIFIC COMPANY.
No. 23755. Division D.

Testimony on Exception, November 16th, 1888. *Filed December 1st,* 1888.

Present: W. W. Howe, for plaintiff (defendant in exception).
" J. P. Blair, for defendant (plaintiff in exception).

Mr. Blair, on behalf of defendant, plaintiff in exception, introduces and offers in evidence the document marked "A" referred to in the petition, being the Gould-Huntington agreement, and the documen- marked "B" referred to, being the modification of the Gould-Huntt ington contract.

(See pp. 13 to 39, *supra.*)

71 JOHN A. GRANT, sworn for plaintiff (defendant in exception).

Examination-in-chief by Mr. HOWE:

Q. Mr. Grant, what is your position with the Texas and Pacific Railway Company?

A. I am general manager and chief engineer.

Q. How long have you occupied that position?

A. About twenty-two months.

Q. How long have you been a railroad engineer and a railroad man?

A. Something over twenty years.

Q. Have you had considerable experience in the management and construction of railroads?

A. Yes.

Q. If I remember, you superintended the construction of the Mississippi Valley road?

A. Yes.

Q. Will you look at the map offered by the defendant in this case and point out to the court the lines of the Texas and Pacific railway in the State of Texas, beginning at the Louisiana line near Shreveport?

A. The road begins at Waco, Texas, and runs through to El Paso, using a joint track with the Southern Pacific from Sierra Blanca to El Paso, a distance of ninety two or three miles.

Q. When it reaches Marshall how does it run?

A. We have a line to Texarkana, thence to Whitesboro', and thence to Fort Worth, and thence to El Paso.

Q. Does the Texas and Pacific own or control any other line of railway in the State of Texas?

A. No, sir.

72 Q. Or any other lines south of its main line?

A. None whatever.

Q. Will you state to the court, as an expert railroad man and engineer, whether or not the Texas and Pacific railway in Texas is parallel and competing with the Southern Pacific?

A. No, sir; I don't consider it so at all.

Cross-examined by Mr. BLAIR:

Q. Captain Grant, as a railroad man, would you not consider two railroads which extend between the same two points on a sufficient— by a direct line to compete with each other, to be parallel, in the sense in which the word is used among railroad men?

A. No, sir; not always. It depends entirely on the distance at which they run apart. They can be competing without being parallel.

Q. If the distance between the two points was sufficiently near for each to be competing with the other would you consider them to be parallel with regard to traffic between the two points?

A. No, sir.

Q. Why?

A. Because we find roads running at right angles competing with each other for other business.

Q. Now, Captain Grant, as far as the business between El Paso and New Orleans is concerned, would you not consider the Texas and Pacific line parallel with the Southern Pacific?

A. Well, I would consider it competing; but it is not parallel.

73 Q. Why not?

A. Because the lines diverge so far from each other—one line runs northwest and the other runs southwest.

Q. Then you would not consider them to be parallel unless they run at an equal distance from each other through the whole extent of the line?

A. No; I might call them parallel in — they run in the same direction all the way through; but the Southern Pacific runs southwest for a considerable distance and the Texas and Pacific runs northwest for a long distance, and they get to be a great distance apart. Their local business is not competitive at all.

Q. How long have you been connected with the Texas and Pacific railway?

A. Twenty-two months.

Q. Previously you have been with the Mississippi Valley R'd? Since then you have been with the Memphis and Charleston road?

A. I was with the Mississippi Valley road some time, and then with the Kansas, Fort Scott and Galveston road.

Re-examined by Mr. Howe:

Q. I recall the attention of the court to the question of the T. and Pacific railway in the State of Texas. Now, Captain Grant, let us take some points on the Texas and Pacific line in Texas; for instance, take Texarkana, which I understand to be one terminus of the Texas and Pacific railway, and between Texas and Arkansas, the town being so named because it is partly in Texas and partly in Arkansas.

A. Yes.

Q. And consider the road between Texarkana and El Paso. Is that either parallel or competing with the Southern Pacific?

74 A. It is not parallel with the Southern Pacific, but it is competing with its connections with other roads.

Q. But it is not competing in itself?

—. ——.

Q. Take the same Texas and Pacific railway in Texas on the line between Louisiana and Shreveport, which I think you call Waco?

A. Yes.

Q. Take the Texas and Pacific by itself and itself from that point to El Paso. Is that competing or parallel with the Southern Pacific?

A. No.

Q. Now take Galveston as a point. As a matter of theory, statements were made in regard to the parallelism, considering Galveston as a terminus. As I understand you, the Texas and Pacific does not control or own any line southward of it to Galveston?

A. No, sir; none at all.

Q. I understand your conclusion; the Texas and Pacific railway, considered as a railway in the State of Texas, is not either parallel or competing with the Southern Pacific?

A. No, sir.

Q. It is not?

A. No, sir. There are three different lines running from Galveston by which we compete with the Southern Pacific, but the freight is delivered to us by those roads.

Q. You have no interest in them except that which any other railroad has in any other railroad that crosses or intersects it?

A. No, sir.

Q. It is the same relation that you have to these roads?

A. Yes.

Q. The same relation that any intersecting railroads in the United States have to each other?

A. Yes.

75 Recross-examined by Mr. Blair:

Q. Will you please mention the connections by the aid of which the Texas and Pacific railway competes with the Southern Pacific in the Galveston traffic?

A. We have the International and Great Northern, which comes to us at Longview and Minneola, Minneola being the point where the freight is delivered, and the Houston and Central gives us business——

Q. I am speaking of Galveston?

A. I am speaking of Galveston. The Houston and Central, through the Galveston line to Houston, Houston and Henderson road, from Houston to Galveston—they give us the business at Fort Worth and Dallas and Cisco. Then there is the Gulf, Colorado and Santa Fé road, which runs directly out of Galveston and crosses our road at Dallas and Fort Worth and connects with us at Weatherton. We have three different connections with Galveston.

Q. Where is Weatherton?

A. About thirty miles west of Fort Worth.

Q. Most of the Galveston traffic carried by the Texas and Pacific railway is carried *by* over by the Galveston, Houston and Henderson and the International and Great Northern?

A. Yes; I think we get most of the business from there.

Q. Is not that the most direct line?

A. We prefer it because we get along in harmony.

Q. Now state the connections through which you compete with the Southern Pacific at other points from Texarkana. Is there not a connection with the Missouri Pacific?

A. And the St. Louis and Iron Mountain road.

Q. That is a road controlled by the Missouri Pacific?

A. Yes.

76 Q. You said something about the Texas and Pacific not owning or controlling any road southward of its line. Can you state as a fact that prior to the connection with the Texas and Pacific the Missouri Pacific was not under the same control and management as the Texas and Pacific?

A. Well, I can only state what I have always understood.

Q. Can you state as a fact that they were under the same contract and agreement?

A. I can state the fact that they had the same general officers—the Texas and Pacific and the Missouri Pacific—before they went into the hands of the receiver; but there was no lease.

Q. Before your connection with the Texas and Pacific, do you know how they were connected?

A. Only from what I heard.

(By Mr. HOWE·)

Q. Allusion was made the other day to a theory that the Texas and Pacific had once a lease with the Missouri Pacific. What can you say in regard to that?

A. As far as I have heard officers in high authority say, there was no lease.

Q. Have you in your management ever discovered any indication of any such lease?

A. No, sir.

Q. Or any record of any lease?

A. No, sir.

77 E. B. WHEELOCK sworn for plaintiff (defendant in exception).

By Mr. HOWE:

Q. You reside in New Orleans?

A. Yes, sir.

Q. Have you any relation to the Texas and Pacific railway?

A. Yes.

Q. You have heard the testimony of Captain Grant just given?

A. Yes.

Q. Do you corroborate it?

A. I do.

Q. How long have you been connected with and interested with the Texas and Pacific and the New Orleans Pacific railway?

A. In the New Orleans and Pacific since 1885 and in the Texas and Pacific since its consolidation with New Orleans and Pacific.

Q. Then you have had experience of thirteen years in railway matters?

A. About that.

Q. Looking at the map, which is marked Exhibit A, being the map offered by the defendant in this case on the exception, and considering the Texas and Pacific railway in Texas extending from Texarkana to El Paso, and also from the Louisiana State line, near Shreveport, called Waco, to El Paso, state whether or not the Texas and Pacific is parallel and a competing line with the Southern Pacific in the State of Texas.

A. It is neither parallel nor competing in Texas, strictly Texas.

Q. Will you please state whether or not the Texas and Pacific railway has any ownership or control of any line being southward of it in Texas, between its main line—lying southward of it in Texas, between its main line and Galveston? 78

A. It has not.

Q. Has it ever had?

A. Never; I was director in the Texas and Pacific for three years, and I know that it never had any ownership or control in any line of railway in Texas lying southward of its main line, between its main line and Galveston.

Q. Has it ever owned or controlled any line of railway between its main line toward the south and the point where the Southern Pacific crosses the Louisiana line, near Orange?

A. The main line of the Texas and Pacific crosses the Louisiana State line near Orange.

—. Now, has the Texas and Pacific railway ever controlled any of these lines which lie between its main line and Orange?

A. No.

Q. Nor has it owned any?

A. No, sir.

Q. You stated that you were a director in the Texas and Pacific for three years?

A. Yes.

Q. Allusion was made the other day by Mr. Gibbs to a supposed lease of the Texas and Pacific railway by the Missouri Pacific. Can you state whether such a lease ever existed?

A. There was never a lease of that kind.

79 Cross-examined by Mr. Blair:

Q. What is the nature of your duties connected with the Texas and Pacific railway?

A. I am general agent of the Texas and Pacific.

Q. At New Orleans?

A. Yes.

Q. The New Orleans and Pacific railway is situated wholly in the State of Louisiana?

A. Yes.

Q. Your duties in connection with the Texas and Pacific railway have been confined to a general agency of the road in New Orleans?

A. Yes.

Q. Have your duties extended to the traffic and operations of the road in Texas?

A. Occasionally, but not to any great extent.

Q. Now, will you give to the court a definition of what is understood by a railroad man as parallelism between two lines?

A. My understanding is that it means two roads built nearly the same route and direction their entire length.

Q. And having common termini?

A. And having common termini.

Q. So that they can compete with each other?

A. Yes.

Q. Now, as to how near they must be to each other in order to be parallel—that rails act to the distance between the two places?

A. They must be a long way apart.

Q. What would determine whether or not they were far enough apart or near enough together to be parallel?

A. In a business point of view, the control of the business
80 and the connections of its location along the line of the
road.

Q. One road may be said to be parallel with another when — is sufficiently near to it to compete with it for business?

A. Yes.

Re-examined by Mr. Howe:

Q. What I want to determine exactly for the benefit of the court in this case, considering this question as a question of parallelism and competition in the State of Texas of those two roads—the Texas and Pacific and the Southern Pacific, each considered by itself a railway—I understand you to say that they are not parallel or competing in the State of Texas?

A. They are not.

81 Cross-examined by Mr. Blair:

Q. Do you mean to say that no freight carried or delivered by the Southern Pacific or the Texas and Pacific is competitive traffic?

A. What is the question again?

Q. Do you mean to say that they don't deliver any freight to El Paso which is competitive?

A. From New Orleans they do.

Q. But freight delivered in Texas is not competitive?

A. From the State line, from Shreveport?

Q. I mean freight carried in Texas by those two roads and delivered in Texas—is that competitive?

A. Not in Texas.

Q. You mean to say that you carry freight from New Orleans to El Paso that is not competitive?

A. I did not say that. I said that from New Orleans to El Paso it was competitive; but freight carried between points in Texas is not competitive, because the roads are too far apart, some four hundred miles apart in some places.

Q. Then from New Orleans to points in Texas they compete for business and traffic?

A. From New Orleans to El Paso the Southern Pacific and the Texas and Pacific are in competition—that is, from New Orleans.

Q. For freight delivered in Texas?
A. For freight delivered in El Paso.

(By Mr. Howe:)

Q. But, Colonel, if I understand my questions and your answers, these roads are not competitive or parallel in Texas?

82 —. No, sir; they are neither competitive or parallel in the State of Texas. I don't think it can be shown that a pound of freight came from Marshall that came from Galveston and went to El Paso.

The exception is continued for argument to Friday, November 23rd, 1888, with — to the parties to take further testimony by consent out of court before next Friday.

83 State of Louisiana:

Civil District Court, Parish of Orleans.

Texas and Pacific Railway Company
vs.
Southern Pacific Company.
No. 23755. Division D.

Testimony Taken by Consent in the Office of Leovy and Blair, New Orleans, November 20th, 1888, *Subject to All Legal Objections Except as to Time, Manner, and Form of Taking. Filed December 1st,* 1888.

Present: J. P. Blair, for plaintiff in exception (defendant in suit).
" W. W. Howe, for defendant in exception (plaintiff in suit).

C. C. Gibbs, recalled for defendant (plaintiff in suit).

84 Examination-in-chief by Mr. Blair:

Q. Mr. Gibbs, you have read the testimony of Capt. Grant and of Colonel Wheelock taken in this case?
A. Yes.
Q. You notice that it is stated by those witnesses that regarding the Texas and Pacific lines in the State of Texas and the Southern Pacific lines in the State of Texas—it is stated by those two witnesses—that they do not compete with each other in the State of Texas? What do you say to that? Do they or not compete?
A. Well, yes; I think they do. In certain localities I know they do.
Q. Explain how and where they compete in the State of Texas.
A. For instance, there is a great amount of competition between Galveston and El Paso, in the State of Texas, and, again, there is no question but that there is direct competition between Marathon, on the line of the Southern Pacific, and Colorado City, on the line of the Texas and Pacific, for traffic to Sierra Blanca, the territory between the two lines named, and the distance mentioned

being strictly what is called disputed territory. I perhaps can more correctly explain that to Judge Howe by the map.

Q. On which of the roads leased by the Southern Pacific Company is Marathon situated?

A. Marathon is situated on the Galveston, Henderson and San Antonio road. I should say, looking at the map, that Marathon is about here.

Witness locates Marathon on the map and the stenographer marks the point indicated on the map "Marathon."

85 Q. Now, what about the territory between those two places, Marathon and Colorado City?

A. We have always considered the territory between those two places competitive, from the fact that cattle have been driven — the time from points near our line to the Texas and Pacific, and cattle would be driven from points near the line of the Texas and Pacific to our line if the rates would justify it.

Counsel for plaintiff (defendant in exception) states that this testimony is taken — to all legal objections except as to method and manner of taking, and, further, makes the special objection that testimony in regard to such points as Marathon and Colorado City and the territory between the two points is irrelevant to the contract sued on.

Counsel for plaintiff in exception (defendant in suit) states that the testimony is offered simply in rebuttal of the testimony adduced by the defendant in exception to the effect that in the State of Texas there is no competition between the lines of the plaintiff company and the lines of the defendant company.

Q. While we are on the cattle trade, have you had any instances of competition in regard to the two roads competing for the cattle trade in Texas?

A. Yes; I have. Will you have me to illustrate that?

Q. You can state anything that you know of your own knowledge.

A. There is a ranch located on the Pechos river owned by Halff and Brother, of San Antonio. They have repeatedly come to me and said, "We have to ship cattle, and we — such and such rates from
Colorado City. We prefer to drive to Marathon if you will
86 equalize the rates; otherwise we will have to shift from
Colorado City."

Counsel for plaintiff makes the same objection to this testimony as heretofore stated.

Witness: I have a telegram now on my desk which I can produce if it is necessary, together with letters pertaining to the same subject.

Q. You can state the fact as to whether or not competition exists in that territory.

A. I was going to say that there is a point on our line called Alpine. There is a ranch located right at that station—that is, about two miles from the station. Parties from Chicago stated to me that they could get such and such rates from Toyah, on the line of the Texas and Pacific line, and if we don't make the rates satisfactory they would drive from our lines to Toyah, opposite Alpine.

Counsel for plaintiff in suit objects to this testimony as hearsay and irrelevant.

WITNESS: I can cite the instance of Fort Davis.

Q. You can state whether or not there is competition between the two lines at Fort Davis.

A. There has been. I don't know that it exists now. I don't think any business goes over the Texas and Pacific now from Fort Davis. Formerly there was competition there and business did not come to Toyah from New Orleans via the Texas and Pacific and by the way of Marshall and Alpine.

Q. As I understand your meaning in particular, there is a territory between the road of the Texas and Pacific and the road of the Southern Pacific, or that part of the Southern Pacific system represented by the Galveston, Harrisburg and San Antonio railway, that is competitive for traffic carried in Texas?

87 A. Yes; there is no question about that.

Q. Now, Mr. Gibbs, with reference to this Galveston traffic, by what connecting lines does the Texas and Pacific carry most of its traffic between Galveston and El Paso?

A. Certainly the bulk of it is carried or the greater portion by the Galveston, Houston and Henderson and the International and Great Northern.

Q. Well, how large a proportion of it is carried over those roads?

A. Well, Mr. Blair, that would be difficult for me to answer. I don't know of a shipment that has gone any other way in my experience of the business.

Q. Would your experience lead you to know as to the general traffic on the Texas and Pacific railway between Galveston and El Paso?

A. Yes; as to the general traffic.

Q. If there had been any considerable business moving by any other line than the one you mentioned would you have been apt to know it?

A. Most undoubtedly, because we compete for that business to some extent.

Cross-examined by Mr. HOWE:

Q. Mr. Gibbs, does the Texas and Pacific railway control the Southern Pacific in Texas?

A. No, sir.

Q. Does the Texas and Pacific own the International and Great Northern railway?

A. I don't think it does.

Q. It don't own the Galveston, Houston and Henderson road?

A. I don't think it does.

88 Q. And it does not control either of those lines?

A. Not that I know of.

Q. The Southern Pacific may be said to extend from El Paso to Orange, may it not, and from El Paso by connections to Galveston?

A. Yes.

Q. Now, suppose, what I understand Mr. Wheelock and Captain Grant to have testified to, that the Texas and Pacific extends from Texarkana to El Paso, and also from Waco to Louisiana State line near Shreveport to El Paso; supposing there were no railroads lying between the main line of the Southern Pacific—leave out the intermediate roads from your mind for the present—then the line from Orange to El Paso would not be either parallel or competitive with the line of the Texas and Pacific from Texarkana to El Paso?

A. For El Paso?

Q. Yes.

A. They would be competitive to El Paso in the matter of lumber.

Q. Perhaps you don't understand me exactly. Suppose under the circumstances I have named——

A. You mean to wipe — all the roads between the two lines?

Q. We will obliterate these lines for the present. Suppose a man at Orange to have lumber to ship to El Paso.

A. Yes.

Q. Would he be a competitor with a man wanting to ship lumber from Texarkana to El Paso?

A. It would not be competitive as far as the individual was concerned at Orange, but it would be competitive for the other fellow at Texarkana. The man at Orange would have no competition with himself.

Q. The man at Orange would have no rational way to send
89 his lumber to El Paso; he would have no rational way of
sending it except by the Texas and Pacific line?

A. I think not; no, sir.

Q. Suppose a man at Waco, on the State line, near Shreveport, wanted to send some stuff to El Paso, he would send it, naturally, by the Texas and Pacific line, would he not?

A. Yes.

Q. He would not think of sending it by the Southern Pacific line under any circumstances?

A. He would not under the circumstances you have named.

Q. So I will call your attention to what we have said in this case, that the Texas and Pacific in itself, considered by itself, are not parallel lines or competitive in the State of Texas?

A. I don't think that can be sustained.

Q. Of course, we may differ in opinion.

A. Under the circumstances you have named, of course *those* could be no competition except for the profit.

Q. Is it not true, Mr. Gibbs, that when you say that the Southern Pacific and the Texas and Pacific are parallel and competitive lines you mean that in consequence of their being connected, as they are, by other railroads running North and South that arrangements can be made for shipping freight by means of other roads, which reserves the business competitive at Galveston?

A. Yes.

Q. That is about it?

A. In one respect that is true; in other respects they are competitive of themselves.

Q. Where they approach each other in the western part of Texas they are competitive?

A. Yes.

Q. So that where a man's ranch lies so that he may drive his cattle either to Toyah or to Alpine the lines are competing there?

90 A. Yes; between Toyah and Alpine.

Q. Of course, that competition that you speak of between Toyeh and Alpine or between Marathon and Colorado City does not touch the question of Galveston?

A. No; that is local except in this respect, Judge Howe: That business can be taken up at either of those points and carried to Galveston by either line by their connections.

—. In other words, this competition and parallelism that you spoke of *is* with reference to Galveston depends, does it not, upon the existence of certain connecting roads?

A. Yes; certain connecting roads, as far as I am aware.

Q. Which are not legally the same corporations?

A. Not to my knowledge.

Re-examined by Mr. BLAIR:

Q. Mr. Gibbs, coming back to the lumberman at Orange and the lumberman at Texarkana, under the conditions mentioned, how about the lumberman situated between those two lines?

A. Well, Mr. Blair, if there were saw-mills located between the two lines named and they sought an outlet for their product, certainly the two lines would be competitive for that business.

Q. Would it not be competitive also for any other goods or merchandise that might be shipped between the two lines?

A. Certainly, considering that there was no other intermediate road between the two main lines.

91 *Examination of Mr. E. W. How.*

E. W. How sworn for defendant (plaintiff in exception).

Examination-in-chief by Mr. BLAIR:

Q. Mr. How, what is your age?

A. Thirty-seven years.

Q. What is your occupation?

A. I am general freight agent of the Mississippi Valley railroad, or Louisville, New Orleans and Texas.

Q. Where do you live?

A. In Memphis, Tennessee.

Q. Prior to your connection with the Louisville, New Orleans and Texas Railroad, what was your business?

A. Immediately prior to that I was freight agent of the Southern Pacific.

Q. And prior to that what was your business?

A. I was chief clerk of the general freight agent of the Southern Pacific. Prior to that I was on the Galveston, Houston and San Antonio road, and before that I had been employed in different capacities with the Galveston and Texas and the Galveston, Houston, and Henderson roads.

Q. Those are in the State of Texas?

A. They are all in the State of Texas, except that part of the Southern Pacific which is in the State of Louisiana.

Q. How long, then, have you been in the freight business, employed ~~on~~ railroads in the State of Texas?

A. Well, until the last two years; practically since 1873.

Q. You are familiar with the general movement of traffic in Texas?

A. I was quite familiar with it when I left the State of Texas, and I still keep up my knowledge of it.

Q. You understand the general movement of traffic between New Orleans and El Paso?

A. Quite well.

92 Q. Over what lines of railroads is the traffic carried?

A. Over the Texas and Pacific via Shreveport and over the Southern Pacific via Houston.

Q. Are there any other competitors for that traffic besides those two lines?

A. No important ones, and I don't know of my own knowledge of any freight going by any other route from New Orleans to El Paso.

Q. Now, as to the movement of freight from Galveston to El Paso, what systems of roads compete for the traffic; what two systems.

A. The Southern Pacific, either by the way of the Galveston, Houston and Henderson, by way of Houston, or by the Gulf, Colorado and Santa Fé, by way of Rosenburg, and the Texas and Pacific, by way of the Galveston, Houston and Henderson, and the International and Great Northern, via Minneola and the Texas and Pacific road to destination.

Q. Then, as far as I understand you, freight carried by the Texas and Pacific from Galveston to El Paso is moved over the Galveston, Houston and Henderson and the International and Great Northern roads?

A. As far as I know, yes.

Q. And freight carried by the Southern Pacific is carried over the Galveston, Houston and Henderson, by way of Houston, or the Gulf, Colorado and Sante Fé, by way of Rosenburg, and the Galveston, Harrisburg and San Antonio to El Paso?

A. Yes.

Q. Now, Mr. How, will you state whether, in your experience as a railroad —, you would consider the route by which the Texas and

Pacific carries between Galveston and El Paso to be parallel or competing lines?

93 Counsel for plaintiff in suit (defendant in exception) objects to the question and to the testimony sought to be elicited, on the ground that it is irrelevant to any issue of law made by the exception.

A. I would say in answer to that question that the route, while not geometrically parallel, are certainly competitive in so far as the business between the two object- points is concerned.

Q. Are they parallel in the sense in which that word is used among railroad men?

A. Yes, sir; in so far as the two objective points are concerned they are.

Q. During the time that you were in Texas and had experience in the moving of Texas traffic what proportion of the traffic carried by the Texas and Pacific between Galveston and El Paso passed over the Galveston, Houston and Henderson and the International and Great Northern roads?

A. That I am unable to say. I had nothing to do with their directors or with their patronage, nor could I tell what the Southern Pacific carried.

Q. Now, Mr. How, in the sense in which the word parallel is used among railroad men would you consider the line of the Texas and Pacific between New Orleans and El Paso to be parallel to those two objective points?

Counsel for plaintiff (defendant in exception) reserve the same objection heretofore stated.

A. Well, in reply to that question I cannot say that the word parallel is used in the sense of competitive quite often. In reference to my own line between Memphis and New Orleans—the Mississippi Valley road—I have always referred to it as being parallel with the Mississippi river, though geometrically it is not. I have always referred — it as being parallel with the Illinois Central, although
94 there are certain angles there that certainly would not make
them literally parallel in a geometrical sense. Still they are strictly competitive, and, in the competitive sense of the word parallel, they are parallel. For instance, between New Orleans and Vicksburg we have the longest line, the distance by our line being 235 miles, while — the Illinois Central via Jackson the distance is some 228 miles, if I remember correctly. Still the two lines are strictly competitive, although not geometrically parallel.

Q. Are those two lines referred to as parallel among railroad men?

A. Well, hardly. I don't suppose I have ever thought of that word in that connection, but in speaking of our line in reference to the Mississippi river I have alluded to it as parallel with the river, and I have been clearly understood by every railroad man that I have spoken to when using that word. At some points we are nearly forty miles from the Mississippi river, while at some other points we are only a mile from the river.

Q. If you were asked for a definition of what is meant by parallel railroads in the sense of the term as used by railroad men, what definition would you give?

A. Well, I would call two roads parallel, even when the lines were not geometrically parallel, provided that they had the same general direction and the same initial and objective points.

Cross-examined by Mr. Howe:

Q. I would like to direct your attention for a moment to the Southern Pacific in the State of Texas and to the Texas and Pacific in the State of Texas. The Southern Pacific does not control the Texas and Pacific?

A. Not that I know of.

95 Q. And the Texas and Pacific does not control the Southern Pacific?

A. Not that I am aware of.

Q. Now, supposing we leave out of account, as stated in my question, Mr. Gibbs, all those north and south lines of railway belonging to other corporations which lie between the main line of the Southern Pacific and the main line of the Texas and Pacific. Suppose they don't exist. Now, in that case you would not say that from Orange to El Paso the Texas and Pacific was a competing line with the Southern Pacific?

A. In the sense of value they may be competitive. For instance, a lumber man at Orange would say to me that they were selling lumber at Texarkana on rates made by the Texas and Pacific which would bar him from the market.

Q. That is competition in a commercial sense?

A. Yes; which also affects general rates.

Q. But if a man came to transport lumber from Orange to El Paso and there weren one of those north and south lines between the main line of the Southern Pacific and the main line of the Texas and Pacific for the carrying of that lumber—

A. No; they could hardly haul it by wagon from Orange to Texarkana.

Q. On the other hand, if there was a man at Texarkana who wanted to send a quantity of dry goods to El Paso the Southern Pacific would not be competitive with the Texas and Pacific for that particular lot of goods?

A. Hardly.

Q. So that looking at the Texas and Pacific by itself as a railroad in Texas, and looking at the Southern Pacific as a railroad by itself in Texas, and supposing a man at El Paso wants to send goods to Texarkana, the Southern Pacific would not be competitive with the Texas and Pacific in that case? 96

A. Naturally it would not—that is, obliterating all the other lines.

Q. Obliterating all intermediary lines?

A. It would not.

Q. The Texas and Pacific does not control the International and Great Northern railway as far as you know?

A. At the present time I don't think they do; but I know from what I heard——

Q. Now, does the Southern Pacific control the International and Great Northern?

A. Not that I am aware of.

Q. In other words, what you call competition in a commercial sense on freight going from El Paso to Galveston and from Galveston to El Paso results from the fact that there are always — and controlled by other corporations which are used against the connecting lines?

A. Taking the Texas and Pacific by itself and the Southern Pacific by itself, yes; that would be the case.

Q. And this competition we are talking about and which I can understand in a certain sense comes from the fact that there are connecting lines between the Southern Pacific and the Texas and Pacific?

A. Most assuredly.

Q. Which don't belong to either the Southern Pacific or to the Texas and Pacific, but over which cars are sent?

A. I don't know as to the ownership, but if there was any competition against the Southern Pacific for the Galveston traffic I don't know that the Southern Pacific has any line of its own running into Galveston, and it would be impossible for the Texas and Pacific to compete for that business unless they were connecting lines. It would be impossible to compete with the Southern Pacific by wagons.

97 Q. Is it usual among railways to send cars over connecting lines?

A. If they have traffic agreements together to do so, but a line generally works with its friends.

Q. There may be merely friendly connections between the lines?

A. Yes; whether by ownership or by friendly agreements.

Q. There may be friendly arrangements without any legal ownership?

A. Yes.

Q. For instance, in travelling over the country you see cars belonging to other corporations on a line of railway?

A. Yes.

Q. You see, for instance, in Massachusetts cars marked as belonging to railways in Illinois?

A. Yes.

98 Re-examined by Mr. Blair:

Q. When you were in Texas were the International and Great Northern and the Houston and Henderson and the Texas and Pacific and the Missouri Pacific under separate and distinct managements or under one management?

Counsel for plaintiff (defendant in exception) objects as irrelevant, and the witness continued to state only what he knows of his own knowledge.

A. Well, as to that I can only speak from a traffic point of view, knowing nothing as to financial ownership.

Q. That is what we want to know. We want you to state what you know from a traffic point of view.

—. At the time when I left Texas, or certainly within a year previous, the International and Great Northern, the Texas and Pacific, the Missouri Pacific in Texas, and the Missouri, Kansas and Texas were bunched in a traffic sense and were known as the Gould traffic system. I remember as far back as 1882 or 1883 issuing a pronunciamento in regard*ing of* freight in the name of the general freight agent of the Galveston, Houston and San Antonio system at the time, Mr. Gibbs, in which, by legal advice, I referred to the roads named as the "Gould Southwestern system."

Counsel for plaintiff (defendant in exception) objects to this testimony as irrelevant.

Q. Mr. How, do you know whether they had the same officers or different officers?

A. They may have had different local officers, but the control was at that time, as I understood it, vested in the general manager, who controlled them all, Mr. Hoxie.

Q. Mr. How, in 1885 how were they designated—up to the date of the receivership?

Counsel for plaintiff (defendant in exception) makes special objection to this testimony as hearsay.

99 A. In 1885 it was known as the Missouri Pacific system, in a traffic sense—late in 1885.

Q. Do you know whether the Galveston, Houston and Henderson was included in the Missouri system?

A. It was operated, I believe, by the Missouri Pacific system or by the Gould Southwestern system, and was certainly under the charge of Mr. Hoxie.

Recross-examined by Mr. Howe:

—. You would not state as a matter of fact that the Galveston, Houston and Henderson was owned by any other corporation than that indicated by its name?

A. I don't know anything about the financial ownership, except that I knew that the control was vested by the people who controlled the Gould Southwestern system or the Missouri Pacific system.

Q. Suppose you were told by persons having actual knowledge of the facts of the legal relations of the parties that all of the roads which you have mentioned as the Gould roads each had its own separate board of directors and separate corporation, would you believe it?

A. I would be quite prepared to believe it.

Q. And suppose you were told that the arrangement you have spoken of as having been recognized by the traffic men was simply a running arrangement by which these roads recognized one general officer and in some instance the same man was president of different roads, you would not be prepared to dispute that?

A. No; I have referred to my knowledge only in a traffic sense.

100 Q. It may have been, then, simply friendly co-operation between those corporations for the purpose of traffic?

A. Possibly.

Q. You have no knowledge by which their financial or legal arrangements were worked?

A. None whatever.

Q. And you could not say, of course, speaking of the particular facts in this case, which is a suit of the Texas & Pacific Railway Company against the Southern Pacific Co., that the Texas and Pacific Company has ever owned or controlled the International railway?

A. No, sir; I could not.

Q. Or that it ever controlled or owned the Galveston, Houston and Henderson railway?

A. No.

101 STATE OF LOUISIANA:

Civil District Court, Parish of Orleans.

THE TEXAS AND PACIFIC RAILWAY Co. *et als.* *vs.* THE SOUTHERN PACIFIC COMPANY. } No. 23755. Division D.

Testimony Taken by Consent at the Office of the T. & P. R. R., No. 47 *St. Charles Street, New Orleans, La., Nov.* 22, '88. *Filed December* 1*st*, 1888.

Present: Mr. W. W. Howe, for plaintiff.
" Mr. Jos. P. Blair, for defendant.

EUGENE H. HINTON, being examined for plaintiff in the case, says:

Examined by Mr. HOWE:

Q. How long have you been connected with the Texas and Pacific Railroad Company?

A. About five years.

Q. In what capacity?

A. In the different branches of the traffic department and as an officer of the company since August 3rd, 1887.

Q. Your connection has been with the traffic department?

102 A. Yes, sir.

Q. Has that connection made you familiar with the traffic operations in Texas?

A. Yes, sir.

Q. Referring to the railroad map of Texas, which is in evidence in this case and marked as Exhibit "X," and taking the Texas and Pacific in Texas, extending from El Paso to Texarkana, as well as from El Paso to Waskom, on the State line near Shreveport, and considering the Southern Pacific system, extending — El Paso to Galveston and from El Paso to Orange, and being out of view of intersecting of north and south lines connecting the main line of the Texas and Pacific, state whether or not the Texas and Pacific and the Southern Pacific system in Texas are parallel or competing lines.

A. They are not competing lines.

Q. Considered with reference to the termini I have mentioned, are they parallel or not?

A. They could not be considered parallel lines; they rather diverge from a given starting point.

Q. Suppose a man at Orange had lumber to ship to El Paso under the circumstances I have mentioned, leaving out entirely all the connecting lines which run north and south, could the Texas and Pacific compete for that lumber?

A. No, sir; they could not.

Q. Suppose a man at Galveston had freight to ship to El Paso by the Southern Pacific, could you, leaving out of view the connecting lines belonging to and controlled by other corporations than the Texas and Pacific—could the Texas and Pacific compete for that freight?

A. No, sir; they could not.

103 Q. Suppose goods to be shipped from Texarkana or Waskom to El Paso by the Texas and Pacific, leaving out lines of which we have spoken, controlled or owned by other corporations, could the Southern Pacific compete for Texarkana or Waskom freight?

A. No, sir.

Q. Mr. Hinton, this is a controversy of what is popularly known as the "Gould-Huntington agreement" of 1881. I call your attention to the fact that the parties of the first part of that agreement are Collis P. Huntington, on behalf of himself and associates of the Southern Pacific railroads of California, Arizona, and New Mexico; the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans railroad of Texas, and the Louisiana Western railway of Louisiana, parties to the first part, and on the other side of the agreement are Jay Gould, for himself and associates and on behalf of the Texas and Pacific Railway Company; the I. and G. N. R. R. Co., the Galveston, Houston and Henderson R. R. Co. of Texas; the Missouri Pacific, the Missouri, Kansas and Texas, and St. Louis, Iron Mountain and Southern Railway Company, and, in view of the same issues in the case, I want to ask you, as a matter of fact, whether the parties of the first part, the corporations I have mentioned on the Huntington side of this agreement, have ever controlled the corporations on the other side, parties of the second part.

A. They never have, to my knowledge.

Q. And have the corporations that I have recited, parties of the second part of this agreement, ever controlled the parties of the first part?

A. No, sir.

Q. I direct your attention to the fact that in the use of the word "control" I include, among other things, administration—fixing of rates—and control of that kind has never been exercised?

A. No, sir.

104 Cross-examined by Mr. BLAIR:

Q. How old are you, Mr. Hinton?

A. I am thirty-five years old.

Q. What is your connection with the Texas and Pacific?

A. I am acting general freight agent.

Q. Whom is the general freight agent?

A. Mr. Finley was, but he has resigned.

Q. How long have you been acting general freight agent?

A. Since the 15th of September.

Q. Before that time what were you?

A. I was assistant general freight agent from August 3rd, 1887.

Q. Before that time what were you?

A. I was a portion of the time commercial agent at this point and a portion of the time rate clerk in the office—where they had a general office—here at this corner.

Q. Prior to August, 1887, you were soliciting agent here in New Orleans and rate clerk?

A. Yes, sir. The fact is commercial agent was my title.

Q. Here in New Orleans?

A. Yes, sir.

EDWARD B. WHEELOCK recalled for plaintiff.

Examined by Mr. HOWE:

Q. I recalled you, Col. Wheelock, simply to put one question to you that I have already put to Mr. Hinton and which I will state to you, referring to the Gould-Huntington agreement, as it 105 sometimes is called, which is the subject of this litigation. The parties of the first part are Mr. Huntington, on behalf of himself and associates and on behalf of the Southern Pacific railroads of California, Arizona, and New Mexico; the Galveston, Harrisburg and San Antonio Railway Co., the Texas and New Orleans Railroad Company of Texas, and the Louisiana Western Railroad Company of Louisiana, and any extensions thereof owned or controlled, etc., on the one side, and on the other side, parties of the second part, are Jay Gould, for himself and associates and for and on behalf of the Texas and Pacific Railway Co., the International and Great Northern, the Galveston, Houston and Henderson R. R. of Texas, and for and on behalf of the Missouri Pacific Railway Co., the Missouri, Kansas and Texas, and the St. Louis and Iron Mountain and Southern. I want to ask you as a matter of fact, referring to certain issues in this case, whether the corporations, parties of the first part, have ever controlled the corporations, parties of the second part.

A. No, sir.

Q. And have the corporations of the second part ever controlled the corporations, parties of the first part?

A. No, sir.

Cross-examination by Mr. Blair:

Q. Were you ever connected with the Iron Mountain road?

A. Only as a representative of it in a certain capacity.

Q. In what capacity?

A. I represented them here in the custom-house matters sometimes.

Q. If you answer to the question about absence of control you mean so far as you know?

A. Yes, sir; so far as I know.

106 It is agreed that the jurat in the case of Mr. A. C. Hutchinson and Mr. E. H. Hinton is hereby waived.

A. C. Hutchinson, being examined for defendant, says:

Examined by Mr. Blair:

Q. Mr. Hutchinson, what is your occupation?

A. I am general manager of the Southern Pacific Company, Atlantic system.

Q. How long have you been general manager?

A. Since March, 1885.

Q. Do you know whether the Southern Pacific line, between New Orleans and El Paso, plays any part in the movement of transcontinental freight—I mean freight passing from New York to the Pacific coast?

A. Yes, sir; a very important part.

Q. What proportion of that transcontinental or through freight is carried over that line? I ask you to state what you know, of your knowledge which you derive from your position as general manager, about what proportion is it, a large or small proportion of transcontinental business.

A. We carry from seventy-five to eighty per cent. of the transcontinental business passing between New York and the Pacific coast, all railroad, by our route to the Southern Pacific route via New Orleans. We carried ninety per cent of it until recently.

107 STATE OF LOUISIANA:

Civil District Court, Parish of Orleans.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
SOUTHERN PACIFIC COMPANY.
} No. 22755. Division D.

Note of Evidence on Exception November 23rd, 1888. *Filed December 1st,* 1888.

Present: W. W. Howe for plaintiff (defendant in exception).
" J. P. Blair for defendant (plaintiff in exception).

Counsel for plaintiff (defendant in exception) introduces and offers in evidence the following acts of Congress of the United States:

An act to incorporate the Texas and Pacific Railway Company and to aid the construction of its road, and for other purposes, approved March 3rd, 1871.

Also act of Congress May 2nd, 1872, supplemental to the foregoing act.

Also act of Congress, supplemental to the foregoing, approved March 3rd, 1873.

Also act of Congress, supplemental to the foregoing, approved June 22nd, 1874.

108 Also the following act of the Legislature of the State of Texas:

An act to incorporate the Texas and Western and Southern Pacific Railroad Company of Texas, approved February 16th, 1852.

Also charter of the Southern Continental Railway Company, approved July 27th, 1870, being an act of the Legislature of the State of Texas.

Also an act of the Legislature of the State of Texas entitled:

An act to incorporate the speedy construction of railways through the State of Texas to the Pacific Ocean. Passed May 24th, 1871.

And it is agreed that the foregoing acts may be referred to as a matter of convenience in the printed pamphlet now filed or in the original laws as published, and that they need not be copied in the transcript of appeal if any appeal be taken. (Pamphlet referred to is annexed, forming pp. 150 to 233 of this transcript.)

Counsel for the Southern Pacific Company, plaintiff in exception, introduces and offers in evidence an act of the Legislature of the State of Texas, passed May 2nd, 1873, entitled An act to define and adjust the rights of the Texas and Pacific Railway Company, and an act to encourage the speedy construction of railways through the State of Texas to the Pacific Ocean, said act being contained in the pamphlet referred to and filed by the defendant in exception.

Counsel for plaintiff, defendant in exception, introduces stamps and files in evidence of the testimony of John A. Grant and E. B. Wheelock, recalled, and of E. H. Hinton taken by consent.

109 Civil District Court, Division D.

TEXAS AND PACIFIC RAILWAY CO. *et als.*
vs. } No. 23755.
SOUTHERN PACIFIC COMPANY.

Note of Evidence of the Southern Pacific Company, Plaintiff in Exception, Defendant in Suit. Filed December 1st, '88.

Counsel for the Southern Pacific Company offer in evidence the testimony, taken by consent of the court, of C. C. Gibbs, recalled; E. W. Howe, and A. C. Hutchinson.

(Signed) LEOVY AND BLAIR.

Chapter 403, being an act to incorporate the Southern Pacific Company, offered in evidence by counsel for defendant (plaintiff in exception), and filed December 1st, 1888:

Chapter 403.

An act to incorporate the Southern Pacific Company.

Be it enacted by the General Assembly of the State of Kentucky:

SECTION 1. That Harry D. McHenry, Wm. G. Duncan, Samuel E. Hill, and Samuel M. Cox, Henry McHenry, Jr., and their associates and successors and assigns be, and they are hereby, created and constituted a body corporate and politic under the name of the Southern Pacific Company, and as such shall have perpetual succession and be capable in law to purchase, grant, sell, or receive in trust or otherwise all kinds of personal and real property to such amount as the directors of said company may from time to time de-
110 termine, and to contract and be contracted with, sue and be sued, plead and be impleaded, appeal and prosecute to final judgment all suits or actions in law or in equity in all courts and places, and to have and use a common seal and to alter the same at pleasure, and to make and establish by-laws, rules, and regulations for the government of said company and the conduct of its business as — said corporations or stockholders therein shall be deemed *or* necessary for the management of its affairs, not inconsistent with the constitution or the laws of the State or of the United States, and generally to execute all acts and things which may be deemed necessary or convenient to carry into effect the powers and privileges herein granted: Provided, however, that the said corporations shall not have the power to make joint stock with, lease, own, or operate any railroad in the State of Kentucky.

SEC. 2. The said corporation is hereby authorized and empowered to contract for, acquire by purchase or otherwise, bonds, stocks, and securities of any corporation, company, or association now existing or hereafter formed or constituted, and bonds, stocks, obligations of any individuals, State, government, or local authorities *or* whatsoever, and to enter into contracts with any company or association or individuals, State, Territory, government, or local authorities in respect of their bonds, stock, obligations, and securities or in respect

to the construction, acquisition, owning, equipment, leasing, maintenance, or operation of any railroads, telegraphs, or steamship lines or any public or private improvements or any appurtenances thereof in any State — Territory of the United States, and to buy, hold, sell,
and deal in all kinds of public or private stocks, bonds, and
111 securities, and said corporation may borrow and loan money,
issue its own bonds or other notices of indebtedness, and sell, negotiate, and pledge the same to such amounts, upon such terms, — in such manner as may be determined from time to time by the directors of said corporation, and it may mortgage all or any part of its property, assets, and franchises to secure such bonds and the interest thereon on such terms and conditions as shall on that behalf be prescribed by its board of directors.

Sec. 3. The capital stock of said corporation shall be one million dollars, divided into shares of one hundred dollars each, which shares shall be deemed personal property, and may — issued, transferred, or forfeited for payment in such manner as the board of directors of said corporation may determine; and no person shall be in anywise liable as a stockholder of said corporation after said capital stock of one million dollars shall have been paid in cash and a certificate sworn and signed to that effect by the treasurer and the majority of the board of directors of said corporation shall have been filed in the office of the secretary of *the* state of this State, nor shall the said corporation nor any of the officers or agents thereof be thereafter bound to make any further returns or certificates: Provided, however, that if the payment of said capital stock — any part thereof shall be withdrawn for or refunded to any of the stockholders when the property of the corporation is insufficient or will thereby be rendered insufficient for the payment of all its debts the stockholders holding the same shall be bound to repay to said corporation or its creditors the amount so withdrawn or refunded.

112 Sec. 4. Any of the persons above named as corporators of said corporation may call the first meeting for the organization of such corporation at the time and place they may appoint by mailing a proper notice of such meeting to each of such corporators at least ten days before the time appointed; and in case a majority of such corporators shall attend such meeting, either in person or by proxy, they may open books for subscription to its capital stock, and whenever five hundred thousand dollars shall be subscribed and ten per cent. of said subscriptions shall be paid in cash the stockholders of said corporation may organize the same and said corporation may proceed to business.

Sec. 5. Each share of stock entitles the holder thereof to one vote, in person or by proxy, at all meetings of the stockholders. The holders of a majority of interest of the capital stock present, in person or by proxy, shall constitute a quorum. (The corporation shall have a lien on all the stock and property of its members — of all debts due by them to said corporation, which may be enforced in such manner as the by-laws prescribe.)

Sec. 6. The stock, property, and affairs of said corporation shall be managed by a board of directors of such members, not less than three, as may be from time to time determined by the corporators or stockholders. The directors shall be elected by the stockholders at such time and place and in such manner and for such terms as the stockholders shall from time to time determine. Meetings of directors or stockholders may be held within or without the State.

No person shall be elected a director who is not a stockholder of the corporation. A majority of the directors shall constitute a quorum of said board for the transaction of business.

113 The directors shall *be* appoint*ed* from their own — a president, and they shall also appoint a clerk and treasurer and such other officers and agents as they may deem proper, to hold their offices during the pleasure of the board.

In case of a vacancy or vacancies in the board the remaining directors may fill such vacancy or vacancies. The capital stock of said corporation may be increased from time to time to such sum as may be determined by the board of directors of said corporation, provided such increase or diminution shall be approved by at least two-thirds in interest of the stockholders of said corporation.

Sec. 7. The annual tax of said corporation shall be the same as is now fixed by law for brokers' license: Provided, that all property owned by said corporation and situated in the State shall pay the same State and local tax as is assessed upon similar property, and capital stock in said corporation owned by citizens of the State shall be assessed against the holders thereof as choses in action under the equalization law.

Sec. 8. The company shall keep an office for the transaction of business and the clerk and assistant clerk of said corporation shall reside in the State of Kentucky, but the said corporation may keep offices at such places outside of this State as, — the judgment of its board of directors, its business may from time to time require: Provided, that — herein contained shall be construed as granting any lottery or banking privileges.

114 Sec. 9. This act shall take effect immediately upon its passage.

(Signed) CHAS. OFFUT,
Speaker of the House of Representatives.
(Signed) JAMES R. HINDOMAN,
Speaker of the Senate.

Approved March 17, 1884.
(Signed) J. PROCTER KNOTT.

By the Governor:
(Signed) JAMES A. McKENZIE,
Secretary of State.

Commonwealth of Kentucky,
Office of the Secretary of State.

I, J. A. McKenzie, secretary of state for the Commonwealth aforesaid, do hereby certify that the foregoing writ has been carefully compared by me with the original on file in this office whereof it purports to be a copy, and that it is a true and exact copy of the same.

[SEAL.] In testimony I hereto sign my name and cause my official seal to be affixed. Done at Frankfort this 15th day of June, A. D. 1885.

(Signed) J. A. McKENZIE,
Secretary of State,
" By H. M. McCARTY,
Ass't Sec't'y of State.

115 *Acts of the Legislature of the State of Texas, Offered in Evidence by Counsel for Plaintiff (Defendant in Exception) and Filed December 1st, 1888.*

An act to incorporate the Galveston Bay Railroad and Lumber Co.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That William Fields, A. M. Gentry, William P. Herwig, Geo. W. Smyth, and William Smith, their associates and successors, be, and are hereby, appointed commissioners to open books and receive subscriptions to the capital stock of a corporation to be styled the "Sabine and Galveston Bay Railroad and Lumber Company," but they shall receive no subscription to said stock unless five per cent. thereof be paid to them at the time of subscribing; and should they receive subscriptions to said stock without such payment they shall be personally liable to pay the same to said corporation when organized. A majority of said commissioners shall constitute a quorum to do business, and they may hold their meetings at such time and places as a majority shall designate: Provided, that public notice of all such meetings shall be given by the publication in some newspaper printed in Liberty county at least sixty days before any such meeting.

SEC. 2. That the subscribers to said capital stock, whenever they shall have elected directors in the manner hereinafter provided, shall be, and they are hereby, created and established a body corporate and politic under the name and style of the "Sabine and Galveston Bay Railroad and Lumber Company," with capacity in said corporate name to make contracts, to have succession and a common seal, to make by-laws for the government and regulation of said company, to sue and be sued, to plead and be impleaded,
116 to grant and receive, and generally to do and perform such acts as may be necessary and proper for and incident to the fulfilment of its obligations for the maintenance of its rights under this act and in accordance with the constitution and laws of the State.

SECTION. 3. That the capital stock of said corporation shall be two million dollars, and it shall have power to increase the same to three and a half millions of dollars; that the said corporation shall be, and is hereby, invested with the right of locating, constructing, and maintaining a railroad connecting at a point on the Sabine river at or near the town of Madison, in Orange county, and running thence west to the tide water of the Galveston Bay, which said terminus shall not be north of the town of Liberty or south of Smith's point, as surveys may determine to be most practicable, crossing the Neches river at or near the town of Beaumont, in Jefferson county, and to make, own, and maintain such sidings, turnouts, depots, bridges, docks, wharves, steamers, and barges as it may deem necessary and expedient for the transaction of its business.

SEC. 4. That the capital stock of said company shall be divided into shares of one hundred dollars each, each share entitling the owner thereof to one vote, in person or by proxy, at all meetings of the company, and the shares shall be deemed personal estate, and shall be transferable by any conveyance in writing recorded either by the treasurer in books kept by him for that purpose at his office or by any other officer duly authorized by the directors in books kept by him at such other place as the directors may appoint, such transfers as are recorded in any other place being within ninety days communicated to the treasurer and by him entered on his books.

117 SEC. 5. That the immediate control and direction of the affairs of said corporation shall be vested in a board of not less than five directors. Said directors shall elect one of their own number to be president of the company. Whenever two hundred thousand dollars of the capital stock of said corporation shall have been subscribed and five per cent. thereof shall have been paid to the commissioners hereinbefore named they shall cause an election to be held by said subscribers at the town of Liberty, in Liberty county, for not less than five directors, having first given public notice of the time of said election in some newspaper published in said county, after which the said commissioners shall account for and pay over to the directors all such sums as they may have received of the capital stock of said company, first deducting a reasonable compensation for their services as commissioners. No person shall be eligible to the office of director unless he be a subscriber or owner of at least three shares of the capital stock. The directors shall have power to fill any vacancy in their body arising from non-election or other cause. They shall have power to appoint a clerk, treasurer, or any other officers or agents as they may deem necessary and prescribe and require bonds for the faithful performance of their duties.

They shall make all necessary rules and regulations for the holding of meetings and all other things they may deem proper for the carrying out the provisions of this charter and business of the company. They shall keep or cause to be kept correct records
118 of all meetings of the directors and company and accurate books and accounts of the receipts and expenditures of the company and all other books and accounts necessary and proper to be kept by such company, which books shall be open to the inspection of the stockholders. A majority of the board of directors shall have the power of the full board, and all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer or other officer authorized by the directors, under the

seal of the company and in pursuance of the vote of the directors, shall be valid and binding.

SEC. 6. That the directors shall have power to receive further subscriptions to the capital stock of said corporation from time to time until the full amount thereof shall have been subscribed, but five per cent. of all such subscriptions shall be paid in cash at the time of subscribing, and the directors shall be personally liable to said company for five per cent. of all subscriptions that they may receive to said capital stock without such payment: Provided, however, that said company, by the vote of a majority of the stockholders, cause certificates of stock to be issued in payment of any debt contracted for the construction or requirements of their road, and any agreement in writing, whereby any person shall become a subscriber to the capital stock of said company, shall be enforced against him according to its terms.

If any subscriber shall fail to pay any amount due upon shares subscribed for by him according to the terms of his subscription,
the directors may, after a twenty-days' public notice, sell at
119 public auction the shares subscribed for by said delinquent
and transfer to the purchaser of such shares. If the proceeds of the sale shall not be sufficient to pay the amount due, with interest and charges, such delinquent shall be held liable to the company for the defect, and if the proceeds shall exceed the amount so due, with interest and charges, he shall be entitled to the surplus.

SEC. 7. That it shall be lawful for the company to hold any land that may be necessary for the purpose of locating, constructing, and maintaining railroads with all necessary depots and other buildings, and by their engineer or agent enter upon and take possession of all such lands as may be necessary for the locating, maintaining, and constructing of said railroad, and if they shall not be able to obtain such lands by agreement with the owner they shall have to pay for the same *for* such amount as shall be determined in the manner provided for in the following section; the land so taken for the railroad shall not exceed two hundred feet, *in* and for depots and buildings only such further width as may be necessary.

SEC. 8. That any person from whom lands have been taken for the purpose set forth in the preceding section may apply to the district court of said county wherein said lands are situated for the appointment of appraisers, and said court, after proof that the president or other officers of the company have been served with a notice describing the lands *ten* before the holding of the court, shall thereupon appoint (3) three disinterested freeholders, citizens of the county, who shall appoint a time and place to hear the application, and the company to whose agent or president a reasonable notice
shall be given by the court of said time and place, and said
120 freeholders, after being sworn, shall, after hearing the parties,
determine the amount of compensation as aforesaid and make return of their award to the court at its next term, and said award may be confirmed and for any sufficient reason rejected by said court in the same manner as awards by arbitrators under rule of court, and if confirmed by the court judgment shall be rendered as

in other cases. In determining the amount of compensation to be paid as aforesaid freeholders shall be governed by the actual value of the lands at the time it was taken, taking into consideration the benefit or injury done to other neighboring lands of the owner by the establishment of said railroad. If in any case the amount found by the arbitrators shall not exceed the sum proved to have been offered by the company to the owner prior to this application to the court the owner shall pay costs of proceedings, otherwise the company shall have to pay the same.

Section 9. That the said company shall have power to borrow money on their bonds or notes at such rates as the directors deem expedient: Provided, however, that nothing in this act shall be construed to confer banking privileges of any kind.

Section 10. That upon a written request of one-fourth of the stockholders the president of the company shall call a special meeting of the directors, and upon written demand of three-fourths of the stockholders the president shall remove any or whole of the directors and order a new election within thirty days, which directors so elected shall hold their offices until the time prescribed for the next regular election.

121 Section 11. That said company shall commence work within one year after the passage of this act, and shall complete a section of twenty-five miles of their road within two years thereafter or this charter shall be null and void.

Section 12. That a majority of the directors of the company shall be citizens of this State, and that their principal office shall be in the State of Texas; and, further, that all elections for officers of the company shall be held at the place where said office is to be located.

Section 13. That the company hereby *regain* at all the reasonable times and for a reasonable compensation to draw over their road the passengers, merchandise, and *cause* of any other railroad corporation which has been or may hereafter be authorized by the Legislature to enter with their railroad and connect with the railroad of this company, and if the respective companies shall be unable to agree upon the compensation aforesaid it shall be the duty of the president of each company to select each one man as a commissioner, and the two commissioners so selected shall choose a third in case of disagreement, neither of whom shall be a stockholder in either road or interested therein, and they shall fix the rates, which shall not be changed for one year from the time of going into effect. The said commissioners shall also fix the stated periods at which said passengers and cars are to be drawn as aforesaid, having reference to the convenience of said compensations and the public who shall
be accommodated thereby. The right or power is especially
122 conferred on this company to connect and contract with any
railroad heretofore or hereafter chartered for the performance
of like transport-, and in case of disagreement between companies the same shall be referred and settled as aforesaid, to *the* binding for the year as aforesaid.

Section 14. That this act of incorporation shall expire in ninety years unless it shall be renewed or extended.

Section 15. That this company shall be subject to the provisions and be entitled to the benefits of any general laws which have been or may be enacted by the State regulating or encouraging the construction of railroads, and that this act take effect from its passage.

Passed September 1st, 1856.

An act for the relief of the Sabine and Galveston Bay *and* Railroad & Lumber Company.

Section 1. Be it enacted by the Legislature of the State of Texas, That the time for the completion of the first section of twenty-five miles of the Sabine and Galveston Bay Railroad and Lumber Company be, and the same is hereby, extended, and the term of three years from the passage of this act is hereby granted to said company for the completion of the first section of twenty-five miles.

123 Section 2. That said company be, and they are hereby, required to complete said road within five years from the completion of said first section of twenty-five miles: Provided, That said company shall have the benefit of all general *trans* enacted by the present Legislature granting extensions to railroad companies in this State.

Section 3. That this act take effect and be in force from and after its passage.

Approved February 13th, 1858.

An act amendatory of and supplemental to "An act entitled 'An act to incorporate the Sabine and Galveston Bay Railroad and Lumber Company.'" Passed September 1st, 1856.

Whereas the Legislature of the State of Louisiana, by *our* approved March 17th, 1859, entitled "An act to recognize and grant the right of way to the Sabine and Galveston Bay Railroad and Lumber Company," incorporated said company in the State of Louisiana and authorized the construction of the company's railroad from the crossing of the Sabine river to the town of New Iberia, in said State of Louisiana, under the name and style of the "Louisiana Division," with the right and privilege to accept any act of the Legislature of the State of Texas changing the name of said corporation to the Texas and New Orleans Railroad Company: Therefore—

124 Section 1. Be it enacted by the Legislature of State of Texas, That the name of the Sabine and Galveston Bay Railroad and Lumber Company be, and is hereby, changed to the "Texas and New Orleans Railroad Company," and that the company may designate that part of their works which may be in the State of Texas as the "Texas Division" and that part lying in the State of Louisiana as the Louisiana Division, and that all contracts, mortgages, debts, and obligations of every description whatsoever heretofore made and now existing between the company and all persons and corporations shall be of the same force, under the name of the "Texas

and New Orleans Railroad Company," as if they had been so originally made.

SECTION 2. That the company be, and is hereby, authorized and empowered to accept of and act under the act of the Legislature of the State of Louisiana incorporating it in that State, March 17th, 1859, and that the directors of the company may increase the capital stock a sufficient amount to cover their works in the State of Louisiana.

125 SECTION 3. That all subscriptions to the capital stock of the company made in the State of Texas to the "Texas Division" shall be expended within the limits of that State, and all subscriptions made in Louisiana for the "Louisiana Division" shall be expended on the work within that State, and that after the completion and opening of both divisions of the company's railroad the board of directors shall have the power and authority to consolidate the same upon such terms and conditions as the holders or owners of two-thirds of the capital stock of the Texas Division may determine upon and assent to.

SECTION 4. That the company shall be and is entitled to all benefits of an act entitled "An act to encourage the construction in Texas by donation of land," approved June 30th, 1854, and an act entitled "An act to provide for the investment of the special school fund in the bonds of railroad companies incorporated by the State," passed August the 13th, 1856, and all acts passed supplemental thereto and amendatory thereof, and it is specially provided that nothing contained in this act or the acts to which it is supplemental and amendatory of shall be so construed as to permit this company to appropriate any part of the said aid received from the State of Texas to the connections of its railroads to the State of Louisiana.

SECTION 5. That this act take effect and be in force from and after its passage.

Approved December 24th, 1859.

126 THE STATE OF TEXAS, *Department of State:*

I, J. M. Moore, secretary of state of the State of Texas, do hereby certify that the foregoing are true copies of the original acts of the Legislature of the State of Texas entitled and approved as follows, to wit, "An act to incorporate the Sabine and Galveston Bay Railroad & Lumber Co.," passed September 1st, 1856; "An act for the relief of the Sabine and Galveston Bay Railroad and Lumber Company," approved February 13th, 1859; "An act amendatory and supplemental to an act entitled 'An act to incorporate the Sabine and Galveston Bay Railroad and Lumber Company,'" passed September 1st, 1856, approved December 24th, 1859, the original enrolled bills of said acts being now on file in this department.

Witnesseth my official signature and the seal of the State affixed, at the city of Austin, this 14th day of May, A. D. 1888.

(Signed) J. M. MOORE,
Secretary of State.

127 *Act of the Legislature of the State of Texas, Offered in Evidence by Counsel for Defendant (Plaintiff in Exception). Filed December 1st,* 1888.

An act to incorporate the Buffalo Bayou, Brazos and Colorado Railroad Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That Sidney Sherman, Hugh McLeod, John G. Todd, John Augie, Jonathan T. Barret, E. A. Allen, W. M. Rice, W. A. Van Alstyne, J. E. Stevens, and B. H. Sheppard and W. H. Hutchins, and their associates and successors, be, and they are hereby, created and established a body corporate and politic, under the name of the Buffalo Bayou, Brazos and Colorado Railway Company, with the capacity in said corporate name to make contracts; to have succession and a common seal; to make by-laws for its government and the regulation of its affairs; to sue and be sued; to plead and be impleaded, to grant and receive, and generally to do and perform all such acts and things as may be necessary or proper for or incident to the fulfillment of its obligations or the maintenance of its rights under this act and consistent with the constitution of the State.

SECTION 2. That the said company be, and is hereby, invested with the right of locating, owning, constructing, and maintaining a railway, commencing at any suitable point on Buffalo bayou, between Lynchburg and Houston, in the county of Harris, and thence running by such course and to such point at or near the Brazos river, between the towns of Richmond and Washington, inclusive, as said company shall deem most suitable, with the
128 privilege of making, owning, and maintaining such branches
of said railway as they may deed expedient.

SECTION 3. That the parties named in this act, or a majority of them, with such persons as they may associate with themselves for this purpose, are hereby appointed commissioners and invested with the right of forming and organizing said company and generally exercising the power of directors until directors are chosen, when the powers of the commissioners shall cease.

SECTION 4. That the capital stock of said company shall not exceed five hundred thousand dollars, the amount to be determined by the commissioners or directors and by them divided into such shares of equal par value as they shall think fit, each share thereof entitling the holder to (1) one vote, in person or by proxy, at all meetings of the company, and the shares shall be deemed personal estate, and shall be transferable by any conveyance in writing recorded either by the treasurer in books kept by him at his office for that purpose or by an officer duly authorized by the directors in books kept by him at such other place as directors may appoint, such transfers as are recorded in such other place being written (within) thirty days, communicated to the treasurer, and by him entered into his books.

SECTION 5. That the immediate government and direction of the affairs of the company shall be vested in a board of not less than

five (5) directors. Said directors shall elect one of their own number to be president of the company. The first board of
129 directors shall be chosen by commissioners and such persons as they may associate with themselves for the purpose and at such time and place as they shall appoint, and they shall hold their offices until others are duly elected in their places by the members of the company. No person shall be eligible to office of director unless a subscriber or owner of at least five (5) shares of the capital stock. The directors shall have the power to fill any vacancy in their own board arising from non-election, death, resignation, or other causes; to appoint a clerk, treasurer, and such other officers and agents as they may consider necessary, and prescribe and require bonds for the faithful performance of their duties. They may, if the same is not fixed by the by-laws, determine the manner of meetings, *of* the number of members that shall constitute a quorum, and do and cause to be done all other lawful matters and things they may deem necessary or proper in conducting the business of the company. They shall keep or cause to be kept accurate records of all meetings of the directors of the company and all other books usual and proper to be kept by such company. A majority of the board of directors shall have the power of the full board, and all conveyances and contracts executed by the president and countersigned by the treasurer or any other officers duly authorized by the directors, under the seal of the company and in pursuance of a vote of the directors, shall be valid and binding.

SECTION 6. That the shares of said capital stock may be disposed of by the directors in such manner and on such terms as they shall think best for the interest of the company, and any agreement in writing whereby a person shall become a subscriber to the
130 capital stock may be enforced against him according to its terms; and if any subscriber shall fail to pay any amount due upon shares subscribed for by him according to the terms of his subscription, the directors may sell at auction and transfer to the purchaser the shares of said delinquent, and if the proceeds of the sale shall not be sufficient to pay the amount so due, with interest and charges, such delinquent shall be held liable to the company for the deficiency, and if the proceeds shall exceed the amount so due, with interest and charges, he shall be entitled to the surplus.

SECTION 7. That it shall be lawful for the company to enter upon and purchase, or otherwise take and hold, any land necessary for the purpose of locating, constructing, and maintaining said railway, with all the necessary depots and other buildings, and if they shall not be able to obtain such land by agreement with the owner thereof, they shall pay therefor such compensation as shall be determined in the manner provided in the following section. The land so taken for the road-bed shall not exceed fifty yards in width, and for depots and buildings only such further width as shall be necessary.

SECTION 8. That any person, when land has been taken as aforesaid, may apply to the district court of the county in which the land

is situated for the appointment of —, and said court shall thereupon appoint three disinterested freeholders of the county, who shall appoint a time and place to hear the applicant and the company, to whom shall be given reasonable notice by the court of said time and place; and said freeholders shall, after being sworn and after hearing the parties, determine the amount of compensation as aforesaid
and make return of their award to said court at its next term,
131 and said award may be confirmed and for any sufficient rea-
son may be rejected by said court in the same manner as awards of arbitrators under a rule of court, and if confirmed by the court judgment shall issue thereon as in other cases. In determining the amount of compensation to be paid as aforesaid said freeholders shall be governed by the actual value of the land at the time it was taken, taking into consideration the benefit or injury done to other neighboring land of the owner by the establishment of said railway. If in any case the amount found by the arbitrators shall not exceed the amount proved to have been offered by said company to the owner prior to this application to the court, the owner shall pay the costs of the proceedings; otherwise the company shall pay the same.

SECTION 9. That it shall be the duty of said company, whenever any State or county road now established shall be crossed by said railway, to make and keep in repair sufficient causeways at such crossings, and in all cases where persons own land on both sides of the railway, and there shall be no other convenient access from one road to the other, such owner shall have the right of passage free of costs at all reasonable times across said railway.

SECTION 10. That the city of Houston is hereby authorized to construct or cause to be constructed a branch of railway from said city to connect with the railway hereby established upon any condemned lands as the company have, and generally have the right to construct their branch as granted by the charter of the railway
company, and the mayor and aldermen of the said city of
132 Houston are hereby made a party to this charter; and when
such railway shall be so constructed the cars of such branch may be run over said main railway or any part thereof, provided the cars of said branch railway are run at such hours as not materially to interfere with the running of the cars of said main railway; and provided, further, that the proprietors of said branch railway pay to the company running said main railway such compensation for the use of said main railway as shall be reasonable, the amount of said compensation, unless agreed upon by the parties, to be determined by three distinct disinterested parties, one of whom shall be chosen by the president or chief officer of said railway companies and the other by those two, the decision of said three men — be final and binding for the period of two years from the rendering of the same; that the proprietors of said branch railway shall not be at liberty to use upon said main line of railway or any part thereof their own engines or any other motive power unless the company owning said railway shall unreasonably refuse or neglect to draw

the cars of said branch over said main railway with the engines or other motive power of said company.

SECTION 11. That as soon as the railway company hereby established running any portion of their road they shall file in the state department full and accurate report of the cost and mode of construction of their road and make such further reports of their doings and condition as the Legislature shall from time to time require.

SECTION 12. That if said company shall cross any navigable stream they shall do it so as not to interfere with its navigation.

133 SECTION 13. That said company may acquire by purchase or gift any real estate the directors shall think desirable in order to promote or hasten the construction of said railway. They may borrow money on their bonds or notes at such rates as shall be deemed expedient: Provided, however, that nothing in this act shall be construed to confer banking privileges of any kind.

SECTION 14. That said commissioners shall have the right to demand and receive such rates and prices for the transportation of freight and passengers as they think proper, not exceeding five cents per mile for passengers and not exceeding the rate of fifty cents per hundred pounds for every hundred miles the same may be carried: Provided, however, that the State shall have the right to regulate the price to be charged for carrying the mails.

SECTION 15. That if any person shall willfully injure or obstruct said railway or its property such person shall be punished by fine and imprisonment at the discretion of the court, and shall also be liable to action by said company for damages.

SECTION 16. That the sale of town lots in the town of Harrisburg hereafter made by said company or their agent shall not be considered binding upon the purchaser unless said railroad shall be in complete and practicable operation for twenty miles within two years from the passage of this charter, the sale of lots to be annulled by reconveyance of the lots *of* the company.

134 SECTION 17. That if said railway is not commenced within one year of the passage of this act, and if at least twenty miles are not in running order within two years, then this charter shall be null and void.

Approved February 11th, 1850.

An act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company and to the other special acts relative to said company.

Whereas, on the seventh of July, 1868, "the road-bed, track, franchise, and chartered rights and privileges" of the Buffalo Bayou, Brazos and Colorado Railway Company were sold on the executions issued on judgments against said company, and, on the twenty-fourth of January, 1870, the railroads of said company from Harrisburg to Alleyton and its franchise, rights, and other property appertaining thereto were sold under the provisions of a mortgage or deed of trust made by said company on the first of November, 1860, all of which appears of record; and

Whereas act of December 19th, 1857, supplementary to and amendatory of an act to regulate railroad companies, provides that the purchasers at such sales and their associates shall be "entitled to have and exercise all powers, privileges, and franchises granted to 'the company sold out' by its charter or by virtue of the general laws of this State," "and shall be deemed and taken to be the true owners of charter and corporate — under the same and vested with all the powers, privileges, rights, and benefits thereof;" and

135 Whereas the purchasers at said sales and their associates have formed a new company under said old name and have expended large sums of money in the reconstruction of said railroad in the purchase and completion of the Columbus Tap railroad and the bridge of the Brazos Iron Bridge Company over the Brazos river at Richmond; and

Whereas the new company desires to be distinguished by name from said "sold-out" company to consolidate its property and to extend said line of railroad: Therefore

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the new company, heretofore known as the Buffalo Bayou, Brazos and Colorado Railroad Company, referred to in the preamble of this act shall be hereafter known by the corporat*ion* name of the "Galveston, Harrisburg and San Antonio Railway Company," and may alter its seal to confirm its name: Provided, that said new company shall be liable to the State of Texas for the debt of said "sold-out" company for loans made to the latter company from the special school fund in the same manner and to the same extent as said "sold-out" company was liable, and that said change of name shall in no respect impair or affect said liability or the existing lien or mortgage of the State upon the railroad of said company as security for said loans; also provided that the said change of name shall in no respect impair or affect any of the obligations of said new company to other parties or the obligations of other parties to said new company, all of which may be enforced by or against said new company under said new name.

SECTION 2. That the said railroad company may avoid the sale of its railroad for its indebtedness to the State for the loans from the special school fund and for the non-payment of the principal 136 and interest by the payment into the treasury of the State on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment in addition on the first day of November of one per cent. upon said aggregate amount, to be applied towards the sinking fund provided for — existing laws in respect to said loans, and by continuing to pay into the treasury of the State six months' interest and one per cent. on account of said sinking fund semi-annually thereafter on the first day of May and November in each year: Provided, that in case of failure to comply with any payment required under this section the Governor shall sell the said road under the regulations provided in the law of August 13th, 1856.

SECTION 3. That said company is hereby authorized to extend the existing line of railroad owned and operated by said company from Columbus, in Colorado county, to San Antonio, in the county of Bexar, within four years from the passage of this act, and thence to a terminus on the Rio Grande by such — as the directors shall deem most feasible, with a branch from the most suitable point to New Braunfel, in Comal county, within four years from the passage of this act, or said new company may connect with any new line of railroad that may be constructed or under construction to San Antonio or the Rio Grande south of the latitude of the city of Austin and the Colorado river instead of building its own line beyond the point of such connection, and may build and connect with any line that may be constructed or under construction and design- to form part of any railroad line to the Pacific south of the thirty-fifth parallel of latitude, nothing herein being so construed as to exclude said
137 new company from the right to construct also any part of the
line up to the Colorado Valley formerly designated by said "sold-out" company as its route under the provisions of the eleventh section of the act December 19th, 1857: Provided, that if the said road shall not be completed within the time specified in this section, then this charter shall be forfeited.

SECTION 4. The said new company may be consolidated with its existing railroad, the bridge built by the Brazos Iron Bridge Company over the Brazos river at Richmond, and all the five miles of railroad, more or less, including side tracks, from the town of Alleyton to the town of Columbus built under the charter granted in 1860 to the Columbus Tap Railroad Company, including the bridge over the Colorado river at Columbus, together with all the franchises, fixtures, rights, and appurtenances of or upon any of the same, and may construct and maintain telegraphs along its line.

SECTION 5. That said new company may issue its bonds, under seal or otherwise, and secure the same by mortgage or mortgages upon its said consolidated line of railroad or any part of the same, and any such mortgage may be so expressed as to include and cover, as said company shall construct the same, the lines of railroad it may construct in connection *of* its existing line, together with all the franchises, bridges, rights, and depots, fixtures, equipments, machinery, and the appurtenances and property of said railroad and of said company of every kind or any part thereof, whether constructed or acquired before or after the execution of said mortgage, and a provision for a sinking fund sufficient for the extinguishment at their
138 maturity of the principal of the bonds secured thereby; that
the amount of bonds that may at any time be outstanding under any such mortgage shall not exceed twenty thousand dollars for each mile of single track, with the necessary turnouts, included in such mortgage and completed, in running order; that all the bonds secured by any such mortgage shall be on an equality in respect to the benefits of the same, shall be of the same form and tenor, except that *it* may be of different dates and for different amounts, and shall mature at the same time in not more than fifty years from the date of those said bonds which shall be first issued;

that the said bonds shall bear interest at such rates not exceeding eight per cent. per annum, payable semi-annually. Both principal and interest shall be payable in gold or other lawful currency of the United States, at the places named in the bonds and coupons, and, with said mortgage or mortgages, may be otherwise in such form and contain such stipulations, not inconsistent with the provisions of this act, as the directors shall think proper to embody therein.

SECTION 6. That new company may issue such other bonds and secure them by other mortgage or mortgages on its railroad, franchise, and property or any part of the same, subsequent and subject to the mortgages hereinbefore provided for, as the interests of said company may require; and any bonds lawfully issued by said new company may be disposed of by the directors on such terms as they shall think proper.

SECTION 7. That the issue of any of the bonds and the execution provided for in the two preceding sections shall not impose or in any way affect the lien or mortgage held by the State upon the railroad,
right, or franchise or property of said new company as security
139 for loans made to said "sold-out" company as aforesaid or
any of the right of the State in respect to the same; and if any such mortgage is made whilst said lien or mortgage of the State exists it shall be made expressly subject thereto.

SECTION 8. That in case it shall be made to appear to the Governor that there has not — upon said railroad the full quantity of the sixteen sections of the land scrip for every mile of same that was constructed and put in running order prior to the war of the late rebellion, in accordance with provisions of the charter and of the general laws of the State in force at the time regulating railroads, there shall be issued to said new company said scrip to the amount of any such deficiency, notwithstanding said railroad may not have been constructed and completed at the rate of twenty-five miles each year after the construction of the first twenty-five miles, as provided in the act of January 30th, 1864.

SECTION 9. That meetings of said new company and directors may, when desirable, be held at the office of said company in Boston, Massachusetts, as well as "the principal office" of the company, in Texas, provided that votes passed at meetings in Boston shall be within thirty days therefrom spread upon the records, which shall be kept at "the principal office," in Texas; that a majority of the directors and the president and treasurer shall not be required to reside in this State so long as the vice-president and assistant treasurer reside therein, and directors may vote by proxy under
such regulations as the by-laws shall prescribe.

140 SECTION 10. That said new company make a terminus of
said railroad at the city of Houston or change the present terminus from Harrisburg to Houston, and for that purpose may acquire, by agreement with the owners, any part of the Houston Tap and Brazoria railroad, and said company may make a terminus at the city of Galveston, arranging with any railroad running to Galveston for a third rail thereon or the connection therewith or extend its own line thereto hereafter.

SECTION 11. That said new company shall be entitled to the same or similar rights and relief, except State aid in bonds or indorsement of or guaranty of interest in bonds, granted to or provided for any other railroad company by the Legislature, so far as such rights or relief are in their character applicable to said new company or its line or lines of railroad.

SECTION 12. That nothing in this act shall be so construed as to deprive any party interested of the right to disprove any assumed fact stated in the preamble: Provided, That nothing in this act contained shall be construed as receiving or renewing any land to said company for the road hereafter to be completed which it does not possess by existing law.

SECTION 13. That this act shall take effect from its passage.

Passed July 27th, 1870.

141 STATE OF TEXAS,
Department of State.

I, J. M. Moore, secretary of state of the State of Texas, do hereby certify that the foregoing are true copies of the following acts of the Legislature of the State of Texas, to wit: "An act to incorporate the Buffalo Bayou, Brazos and Colorado Railroad Company," approved February 11th, 1850; "An act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company and to the other special acts relating to said company," passed July 27, 1870, the original enrolled bills of said acts being now on file in this department.

Witness my official signature and seal of State, affixed at the city of Austin, this 12th day of May, A. D. 1888.

[SEAL.] (Signed) J. M. MOORE,
Sec'ty of State.

142 *Exception Maintained.*

Extract from the Minutes of December 21st, 1886.

Civil District Court.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
SOUTHERN PACIFIC COMPANY.
No. 23755. Division D.

Present: The Honorable N. H. Rightor, judge.

In these exceptions submitted to the court for adjudication, and the court considering the prohibition contained in art. 10, sec. 5, of the constitution of Texas, adopted in 1876, and, for reasons orally assigned by the court, the law and evidence being in favor of plaintiff in exceptions, it is ordered that the peremptory exceptions filed herein on May 19th, 1888, be maintained, and accordingly that plaintiff's suit be dismissed. Judgment rendered December 21st, 1888, with costs.

Judgment signed January 25th, 1889.

(Signed) N. H. RIGHTOR, *Judge.*

143 *Motion for a New Trial. Filed January 2nd,* 1889.

Civil District Court, Division D.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs. } No. 23755.
SOUTHERN PACIFIC COMPANY.

On motion of Howe and Prentiss, attorneys for the plaintiffs, and suggesting that there is error to the prejudice of plaintiffs in the judgment of the court rendered herein December 21st, 1888, sustaining the exception of defendant and dismissing the suit, it is ordered that the defendant show cause, on Friday the 11th of January, 1889, why a new trial should not be granted on said exceptions for the following reasons:

1. That the judgment sustained in said exception is contrary to law and evidence.

2. That the agreement sued on does not conflict with the constitution of Texas and it is not the consolidation or control of one railroad by another in any sense or under any circumstances prohibited in said constitution.

3. The agreement sued on concerns largely the interstate commerce, and the Texas constitution, as construed and applied herein by the court, is so construed and applied as to violate article one, section eight, paragraph three, of the Constitution of the United States, conferring on Congress the power to regulate commerce among the several States.

144 4. The said constitution of Texas is so construed and applied as to impair the rights conferred by Congress and by the State of Texas on the plaintiff company and so to impair its contract rights, and thus to violate article one, section 10, of paragraph one of the Constitution of the United States, forbidding a State to pass any law impairing the obligations of contracts.

S. 5. That, as appears on the face of the petition and exhibits admitted by the exceptions to be true, the agreement sued on was made in good faith for great considerations which have been executed; that the defendant has accounted thereunder from time to time and admits the amount due as matter of fact, and the State of Texas and her officers have never complained of the agreement.

6. That since the decision complained of, and on —about the 22nd of December, 1888, the supreme court of Texas has construed the article of her constitution in question, and has done so in a way which mover avers to be favorable to plaintiff's position herein and to justify a new trial, as by the report of said decision will appear.

And mover reiterates the other points set forth in its printed agreements in the exceptions.

145 *Rule Discharged.*

Extract from the Minutes of January 25th, 1889.

Civil District Court, Division "D."

TEXAS AND PACIFIC RAILWAY COMPANY } No. 23755.
vs.
SOUTHERN PACIFIC COMPANY.

Present: Honorable N. H. Rightor, judge. Howe & Prentiss, for plaintiffs in rule; Leovy & Blair, for defendants in rule.

This rule came on this day for trial.

When, after hearing pleadings, evidence, and counsel, and for the reasons orally assigned by the court, the law and evidence being in favor of defendant in rule—

It is ordered that the rule filed herein for a new trial be discharged with costs.

146 *Motion of Appeal.*

Extracts from the Minutes of January 30th, 1889.

Civil District Court, Parish of Orleans, Division D.

TEXAS AND PACIFIC RAILWAY CO. *et als.* } No. 23755.
vs.
SOUTHERN PACIFIC COMPANY.

Present: Honorable N. H. Rightor, judge.

— motion in open court of Howe & Prentiss, attorneys for plaintiffs, suggest- *in* error to *be* plaintiff's prejudice in the judgment rendered herein Dec. 21st, 1888, and signed Jan. 25th, 1889, maintaining defendant's exceptions and dismissing this suit, it is ordered that a suspensive appeal be granted to plaintiffs from said judgment to the supreme court of Louisiana, returnable on the third Monday of February, 1889 (there not being time to prepare a transcript for an earlier day), and in furnishing an appeal bond with good and solvent surety, conditioned as the law directs, in the sum of two hundred and fifty dollars.

Bond on Appeal. Filed January 30th, 1889.

147 TEXAS & PACIFIC RAILWAY CO. *et als.* }
vs.
SOUTHERN PACIFIC COMPANY.

Bond on appeal.

Know all men by these presents that we, the Texas & Pacific Railway Co. and John C. Brown, as receiver, and Edward B. Wheelock, as surety, are held and firmly bound unto E. A. Luminais, clerk of the civil district court of the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of two hundred and fifty dollars; for the payment whereof we bind ourselves, our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated, in the city of New Orleans, this thirtieth day of January, in the year of our Lord one thousand *one* hundred and eighty-nine.

Whereas the above-bounden principals have this day filed a motion of appeal from a final judgement rendered against them in the suit of Texas & Pacific Railway Co. *et als. versus* The Southern Pacific Co., No. 23755 of the civil district court for the parish of Orleans, on the 21st day of December, 1888, and signed on the 25th day of January, 1889:

Now, the condition of the above obligation is such that the above-bound principal obligors shall prosecute their said appeal and shall satisfy whatever judgement may be rendered against them or either of them, or that the same shall be satisfied by the proceeds of the sale of the estate, real or personal, if they be cast in the appeal;
otherwise that the said surety, Edward B. Wheelock, shall be
148 liable in their place.

THE TEXAS & PACIFIC RAILWAY COMPANY AND
JOHN C. BROWN, *As Receiver.*
(Signed) HOWE & PRENTISS, *Att'ys.*
(Signed) E. B. WHEELOCK.

Signed, sealed, and delivered in presence of—
(Signed) L. C. BOWMAN.

149 (Copy.)

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, Edgar A. Luminais, clerk of the civil district court for the parish of of Orleans, do hereby certify that the foregoing one hundred and eighty-seven pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause wherein The Texas & Pacific Railway Company *et al.* are plaintiffs and The Southern Pacific Company is defandant, instituted in this court and now in the records thereof under the No. 23755.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this sixteenth day of February, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the United States of America.

(Signed) E. A. LUMINAIS, *Clerk.*

150 *Pamphlet Containing Charter and Other Legislation Relating to the Texas and Pacific Railway Company. Filed Feb. 18th,* 1889.

See note of evidence at p. 108 of this transcript.

No. 23755 (Civil District Court).

Filed Dec. 1st, 1888.
(Signed) W. H. STAUB, *D'y Clerk.*

Supreme Court of La.

Filed Feb. 18th, 1889.

151 *Charter and Other Legislation Relating to the Texas and Pacific Railway Company.*

152 — An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes.

Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled, That John C.
Fremont, James L. Alcorn, G. M. Dodge, O. C. French, John D.
Caldwell, J. J. Noah, A. C. Osborne, Timothy Hurley, C. C. Pool,
Silas N. Martin, John M. Corse, George E. Wentworth, Philip H.
Morgan, J. D. Cameron, Marshall O. Roberts, James L. Hodges,
John Ray, W. Vermilye, Enoch L. Fancher, Charles F. Livermore,
Joseph H. Oglesby, John Whytock, Daniel Drew, F. S. Davis, W.
Orton, A. C. Babcock, Thomas A. Scott, Samuel D. Hoffman, H.
Ramsdale, William H. Jackson, R. C. Parsons, Delos W. Emmons,
M. A. Southworth, John H. Hall, G. C. Kinzey, W. P. Clark, James
Dart, H. Jacobs, L. T. Smith, W. P. Dole, C. A. Weed, A. P. K. Saf-
ford, H. McCullough, Charles Jackson, Elisha Dyer, Alfred Anthony,
James Hoy, M. W. Benjamin, H. D. Cooke, Joseph R. West, W. S.
Huntington, J. M. Tebbetts, C. C. Leondridge, D. D. Porter, M.
Woodhull, Hiram Price, M. C. Hunter, W. T. Walters, J. B. Brown-
low, T. A. Morris, Owen Tulter, J. H. Ledlie, R. M. Bishop, Samuel
Craighead, D. N. Stanton, Augustus H. Whiting, G. L. Johnson, J.
W. Goodland, Powell Clayton, Samuel Tate, W. Bolton, H. Robin-
son, George Maney, O. H. Bynum, M. Burns, J. C. Goodloe, E. G.
Barney, Cyrus Busey, J. W. Forney, J. Lockwood, E. M. Davis, N.
Patton, W. Flanegan, G. O'Brien, G. P. Buel, G. H. Gidding, J. J.
Newell, E. W. Rice, R. M. Shoemaker, Samuel Sloan, S. W.
153 Morton, J. B. Bowman, L. M. Flournoy, J. J. Hinds, G. R.
Weeks, J. T. Ludling, B. C. Gilbert, B. D. Williams, Thomas
Olcott, G. A. Fosdick, Harry Hayes, P. S. Forbes, John T. Sprague,
L. R. Marsh, A. W. Beckwith, J. C. Stanton, Cyrus H. Baldwin, A.
J. Hamilton, Rush R. Sloan, Silas C. Colgrove, Samuel D. Jones, N.
H. Decker, William N. Leet, B. F. Allen, J. B. Chaves, Augustus
Kountze, John N. Goodwin, William S. Rosecrans, Michael Hahn,

H. C. Warmouth, J. S. Williams, G. M. Spencer, L. J. Higbie, W. C. Kimball, and all such persons as shall or may be associated with them and their successors are hereby created a body politic and corporate, in fact and in law, by the name, style, and title of the Texas Pacific Railroad Company, and by that name shall have perpetual succession and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas, thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona to a point on the Rio Colorado at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ship's channel in the Bay of San Diego, in the State of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act.

SEC. 2. That the persons named in the first section of this act shall constitute a board of commissioners (twenty of whom shall
154 constitute a quorum for the transaction of business), to be known as the Texas Pacific railroad commissioners, who shall meet in the city of New York within ninety days after the passage of this act, at a time to be designated in a notice to be signed by the person first named in the list of corporators and six of his associates, and to be published for two weeks in at least one daily newspaper in New York, New Orleans, and Washington; and when so met they may cause books to be opened for the subscription of the capital stock of said company, and when twenty thousand shares, amounting to two millions of dollars, shall have been subscribed, and ten per centum actually paid thereon in money to the treasurer to be elected by said commissioners, who shall give bond for its safe-keeping and payment to the treasurer of the company when organized, then it shall be lawful for such subscribers or stockholders, or a majority thereof, to organize said company in accordance with the provisions of this act and to elect not less than seven nor more than seventeen directors, a majority of whom shall be necessary to the transaction of business, and who shall hold their offices for one year and until their successors shall be elected and qualified; and the said directors shall immediately proceed to elect a president, vice-president, secretary, and treasurer. The president and vice-president shall be directors. At all elections for directors each share of stock shall be entitled to one vote, which may be given by the holders in person or by proxy, who shall also be a shareholder. The directors shall hold their offices for any term not exceeding

three years, as may be provided in the by-laws, and the annual meetings of stockholders shall take place as provided for in said by-laws.

Sec. 3. That the capital stock of the Texas Pacific Railroad Company shall be fixed by the board of directors at a sum not exceeding fifty millions of dollars, in shares of one hundred dollars, and when the amount is so fixed it shall never be increased except by consent of Congress. Assessments upon said stock shall only be
made by a majority vote of the whole number of directors at
155 a regular meeting, which said assessments shall be paid at
the expiration of thirty days, after a notice given in one newspaper in each of the cities of Washington, Philadelphia, New York, and New Orleans.

Sec. 4. That the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of and consolidate on such terms as may be agreed upon between the parties with any railroad company or companies heretofore chartered by congressional, State, or territorial authority on the route prescribed in the first section of this act, but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.

Sec. 5. That the said company shall have power and authority to make running arrangements with any railroad company or companies heretofore chartered or that may hereafter be chartered by congressional, State, or territorial authority; also to purchase lands or to accept donations or grants of lands or other property from States or individuals for the purpose of aiding in carrying out the object of this company.

Sec. 6. That the rights, lands, land grants, franchises, privileges, and appurtenances and property of every description belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas Pacific Railroad Company, provided that in all contracts made and entered into by said company with any and all other railroad company or companies to perfect such aforesaid consolidation or purchase the indebtedness or other legal obligations of said company or companies shall be assumed by the said Texas Pacific Railroad Company as may be agreed upon, and no such consolidation or purchase shall impair any lien which may exist on any of the railroads so consolidated or purchased; but said company shall not assume the debts or obligations of any company
with which it may consolidate or purchase as aforesaid to an
156 amount greater than the cash value of the assets received
from the same.

Sec. 7. That the said Texas Pacific Railroad Company shall have power to make and enforce rules and by-laws for the election of its officers and the government and management of the business of the company, and to do and perform all needful and proper things to be done and performed to promote the objects of the company hereby incorporated, not inconsistent with the laws of the United States and the provisions of this charter.

Sec. 8. That the right of way through the public lands be, and the same is hereby, granted to the said company for the construction of the said railroad and telegraph line, and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, and there is also hereby granted to said company grounds for stations, buildings, workshops, wharves, switches, side tracks, turntables, water stations, and such other structures as may be necessary for said railroad, not exceeding forty acres of land at any one point.

SEC. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or
otherwise disposed of by the United States, and to which a
157 pre-emption or homestead claim may not have attached at the
time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted or otherwise disposed of other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If in the too near approach of the said railroad line to the boundary of Mexico the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad or in lieu of mineral lands excluded from this grant a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest the line of said railroad may be selected as above provided, and the word "mineral," where it occurs in this act, shall not be held to include iron or coal: Provided, however, that no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term "ship's channel," as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego Bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way as herein granted: And provided further, that all such lands so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands at a price to be fixed by and paid to said

three years, as may be provided in the by-laws, and the annual meetings of stockholders shall take place as provided for in said by-laws.

SEC. 3. That the capital stock of the Texas Pacific Railroad Company shall be fixed by the board of directors at a sum not exceeding fifty millions of dollars, in shares of one hundred dollars, and when the amount is so fixed it shall never be increased except by consent of Congress. Assessments upon said stock shall only be
made by a majority vote of the whole number of directors at
155 a regular meeting, which said assessments shall be paid at
the expiration of thirty days, after a notice given in one newspaper in each of the cities of Washington, Philadelphia, New York, and New Orleans.

SEC. 4. That the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of and consolidate on such terms as may be agreed upon between the parties with any railroad company or companies heretofore chartered by congressional, State, or territorial authority on the route prescribed in the first section of this act, but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.

SEC. 5. That the said company shall have power and authority to make running arrangements with any railroad company or companies heretofore chartered or that may hereafter be chartered by congressional, State, or territorial authority; also to purchase lands or to accept donations or grants of lands or other property from States or individuals for the purpose of aiding in carrying out the object of this company.

SEC. 6. That the rights, lands, land grants, franchises, privileges, and appurtenances and property of every description belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas Pacific Railroad Company, provided that in all contracts made and entered into by said company with any and all other railroad company or companies to perfect such aforesaid consolidation or purchase the indebtedness or other legal obligations of said company or companies shall be assumed by the said Texas Pacific Railroad Company as may be agreed upon, and no such consolidation or purchase shall impair any lien which may exist on any of the railroads so consolidated or purchased; but said company shall not assume the debts or obligations of any company
with which it may consolidate or purchase as aforesaid to an
156 amount greater than the cash value of the assets received
from the same.

SEC. 7. That the said Texas Pacific Railroad Company shall have power to make and enforce rules and by-laws for the election of its officers and the government and management of the business of the company, and to do and perform all needful and proper things to be done and performed to promote the objects of the company hereby incorporated, not inconsistent with the laws of the United States and the provisions of this charter.

SEC. 8. That the right of way through the public lands be, and the same is hereby, granted to the said company for the construction of the said railroad and telegraph line, and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road earth, stone, timber, and other materials for the construction thereof. Said right of way is granted to said company to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, and there is also hereby granted to said company grounds for stations, buildings, workshops, wharves, switches, side tracks, turntables, water stations, and such other structures as may be necessary for said railroad, not exceeding forty acres of land at any one point.

SEC. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or
otherwise disposed of by the United States, and to which a
157 pre-emption or homestead claim may not have attached at the
time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted or otherwise disposed of other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If in the too near approach of the said railroad line to the boundary of Mexico the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad or in lieu of mineral lands excluded from this grant a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest the line of said railroad may be selected as above provided, and the word "mineral," where it occurs in this act, shall not be held to include iron or coal: Provided, however, that no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term "ship's channel," as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego Bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way as herein granted: And provided further, that all such lands so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and preemption like other lands at a price to be fixed by and paid to said

company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted.

SEC. 10. That when the route of said railroad and telegraph line shall pass through the lands of private persons or where it
158 may be necessary for said railroad company to take any lands
belonging to private persons for any of the purposes herein mentioned necessary to said road such right of way through or title to such lands shall be secured in accordance with the laws of the State or Territory in which they may be situated.

SEC. 11. That the Texas Pacific Railroad Company shall have power and authority to issue two kinds of bonds secured by mortgage, namely, first, construction bonds; second, land bonds. Construction bonds shall be secured by mortgage—first, on all or any portion of the franchises, road-bed, or track of said railroad and all the appurtenances thereto belonging, when constructed or in the course of construction, from a point at or near Marshall to ship's channel, in the Bay of San Diego, in the State of California, as aforesaid. Land bonds shall be secured by mortgage—first, on all or any portion of the lands hereby granted in aid of the construction of said railroad, as is provided for in this act; second, on lands acquired by any arrangement or purchase or terms of consolidation with any railroad company or companies to whom grants of lands may have been made or may hereafter be made by any congressional, State, or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation: Provided, that all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be sufficient evidence of their legal execution, and shall confer all the rights and property of said company as therein expressed: And provided also, that the proceeds of the sales of the aforesaid construction and land bonds shall be applied only in the construction, operation, and equipment of the contemplated railroad line: And provided further, that said mortgage shall in nowise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation.

SEC. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive
159 miles of said railroad and put it in running order as a first-
class road in all its appointments it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which — shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road as near as may be, and shall file a map of the same in the Department of the Interior, and when the map is so filed the Secretary of the Interior immediately thereafter shall cause the lands within forty miles on each side of said designated route within the territories and twenty miles within the State of California to be withdrawn from pre-emption, private entry, and sale: Provided, however, that the provisions of the act of September, eighteen hundred and forty-

one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said company.

SEC. 13. That the president of the company shall annually, by the first day of July, make a report and file it with the Secretary of the Interior, which report shall be under oath, exhibiting the financial situation of the company, the amount of money received and expended, and the number of miles of road constructed each year, and, further, the names and residences of the stockholders, of the directors, and of all other officers of the company; the amount of stock subscribed and the amount thereof actually paid in, a description of the lines of road surveyed and fixed upon for construction, the amount received from passengers and for freight, respectively, on the road, a statement of the expenses of said road and its fixtures, and a true statement of the indebtedness of said company and the various kinds thereof.

160 SEC. 14. That the certificates of the capital stock must be signed by the president and secretary and attested by the seal of the company and shall contain an extract from the proceedings of the board of directors fixing the amount thereof, as well as from this act authorizing such issue. All the bonds and mortgages issued by the said company must be signed by the president and secretary and attested by the seal of said company and shall contain an extract from the law authorizing them to be issued. The face value of said bonds shall be one thousand dollars in gold and shall be redeemable at such times and to bear such rate of interest, payable semi-annually in gold, as may be determined by the directors. The total value of the construction bonds to be issued shall not exceed thirty thousand dollars per mile of said railroad, and the total face value of the land bonds shall not exceed two dollars and fifty cents per acre for all lands mortgaged, the total amount of each to be determined by the board of directors.

SEC. 15. That all railroads constructed or that may be hereafter constructed to intersect said Texas Pacific railroad shall have a right to connect with that line; that no discrimination as regards charges for freight or passengers or in any other matter shall be made by said Texas Pacific Railroad Company against any of the said connecting roads, but that the same charges per mile as to passengers and per ton per mile as to freight passing from the said Texas Pacific railroad over any of said connecting roads or passing from any of said connecting roads over any part of said Texas Pacific railroad shall be made by said company as they make for freight and passengers over their own road: Provided also, that said connecting roads shall reciprocate said right of connection and equality of charges with said Texas Pacific railroad: And provided further, that the rates charged for carrying passengers and freight per mile shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads.

161 SEC. 16. That said road shall be constructed of iron or steel rails manufactured from American ore, except such as may have heretofore been contracted for by any railroad company which may be purchased or consolidated with by the company hereby incorporated, as provided by this act.

SEC. 17. That the said Texas Pacific Railroad Company shall commence the construction of its road simultaneously at San Diego, in the State of California, and from a point at or near Marshall, Texas, as hereinbefore described, and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said points complete and in running order within two years after the passage of this act; and to so continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from the aforesaid point on the eastern boundary of the State of Texas to the Bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of this act; and upon failure to so complete it Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion.

SEC. 18. That the President of the United States, upon the completion of the first section of twenty miles, shall appoint one commissioner, whose duty it shall be to examine the various sections of twenty miles as they shall be completed and report thereon to him in writing; and if from such report he be satisfied that said company has fully completed each section of its road as in this act provided he shall direct the Secretary of the Interior to issue patents to said company for the lands it is entitled to under this act as fast as each section of said road is completed.

SEC. 19. That the Texas Pacific Railroad Company shall be, and it is hereby, declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States no act of the company nor any law of any State or Territory shall impede, delay, or
162 prevent the said company from performing its obligations to the United States in that regard: Provided, that said road shall be subject to the use of the United States for postal, military, and all other governmental services at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference in the use of the same for the purpose aforesaid.

SEC. 20. That it shall not be lawful for any of the directors, either in their individual capacity or as members of an incorporated or joint-stock company, to make any contracts or agreements with the said Texas Pacific Railroad Company for the construction, equipment, or running of its road or to have any interest therein, and all such contracts or agreements are hereby declared null and void, and all money or property received under such contracts or agreements may be recovered back for the benefit of the company by any stockholder.

SEC. 21. That any railroad company whose route lies across the route of the Texas Pacific railroad may cross the same, and for the purpose of crossing shall have the right to acquire at the double minimum price all lands, whether of the United States or granted by this act, which shall be needed for a right of way two hundred feet wide through said lands, and for depots, stations, side tracks, and other needful purposes, not exceeding for such purposes forty acres at any one station.

SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have right to connect, by the most eligible route to be selected by said company, with the said Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and 163 assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by this act granted in the State of California to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California: Provided, that said company shall complete the whole of said road within five years from the passage of this act.

SEC. 23. That for the purpose of connecting the Texas Pacific railroad with the city of San Francisco the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachap Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

Approved March 3, 1871.

164 May 2, 1872—Changing name of company.

An act supplementary to an act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the name, style, and title of the Texas Pacific Railroad Company shall hereafter be "The Texas and Pacific Railway Company," and the said prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads.

161 SEC. 16. That said road shall be constructed of iron or steel rails manufactured from American ore, except such as may have heretofore been contracted for by any railroad company which may be purchased or consolidated with by the company hereby incorporated, as provided by this act.

SEC. 17. That the said Texas Pacific Railroad Company shall commence the construction of its road simultaneously at San Diego, in the State of California, and from a point at or near Marshall, Texas, as hereinbefore described, and so prosecute the same as to have at least fifty consecutive miles of railroad from each of said points complete and in running order within two years after the passage of this act; and to so continue to construct each year thereafter a sufficient number of miles to secure the completion of the whole line from the aforesaid point on the eastern boundary of the State of Texas to the Bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of this act; and upon failure to so complete it Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion.

SEC. 18. That the President of the United States, upon the completion of the first section of twenty miles, shall appoint one commissioner, whose duty it shall be to examine the various sections of twenty miles as they shall be completed and report thereon to him in writing; and if from such report he be satisfied that said company has fully completed each section of its road as in this act provided he shall direct the Secretary of the Interior to issue patents to said company for the lands it is entitled to under this act as fast as each section of said road is completed.

SEC. 19. That the Texas Pacific Railroad Company shall be, and it is hereby, declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States no act of the company nor any law of any State or Territory shall impede, delay, or
162 prevent the said company from performing its obligations to the United States in that regard: Provided, that said road shall be subject to the use of the United States for postal, military, and all other governmental services at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference in the use of the same for the purpose aforesaid.

SEC. 20. That it shall not be lawful for any of the directors, either in their individual capacity or as members of an incorporated or joint-stock company, to make any contracts or agreements with the said Texas Pacific Railroad Company for the construction, equipment, or running of its road or to have any interest therein, and all such contracts or agreements are hereby declared null and void, and all money or property received under such contracts or agreements may be recovered back for the benefit of the company by any stockholder.

SEC. 21. That any railroad company whose route lies across the route of the Texas Pacific railroad may cross the same, and for the purpose of crossing shall have the right to acquire at the double minimum price all lands, whether of the United States or granted by this act, which shall be needed for a right of way two hundred feet wide through said lands, and for depots, stations, side tracks, and other needful purposes, not exceeding for such purposes forty acres at any one station.

SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have right to connect, by the most eligible route to be selected by said company, with the said Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and 163 assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by this act granted in the State of California to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California: Provided, that said company shall complete the whole of said road within five years from the passage of this act.

SEC. 23. That for the purpose of connecting the Texas Pacific railroad with the city of San Francisco the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachap Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

Approved March 3, 1871.

164 May 2, 1872—Changing name of company.

An act supplementary to an act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the name, style, and title of the Texas Pacific Railroad Company shall hereafter be "The Texas and Pacific Railway Company," and the said

The Texas and Pacific Railway Company shall have, possess, and enjoy all rights, privileges, and franchises heretofore conferred upon the said Texas Pacific Railroad Company.

SEC. 2. That the said The Texas and Pacific Railway Company shall have power and authority to issue the construction and land bonds authorized by the eleventh section of said act of incorporation for such amounts, not exceeding forty thousand dollars per mile of said road, of construction bonds as said company may deem needful to provide for the construction and equipment of its line, and to include in the mortgage or mortgages to secure said construction bonds all or any portion of the lands granted in aid of the construction of said railroad, and in the mortgage or mortgages to secure said land bonds any portion of said lands not so used to secure the construction bonds aforesaid and all or any portion of the lands acquired by the terms of consolidation lawfully authorized by the fourth section of said act March third, eighteen hundred and seventy-one, with any railroad company or companies to
165 whom grants of land may have been made or may hereafter
be made by any congressional, State, or territorial authority or who may have purchased the same previous to any such arrangement or consolidation and within the time limited for the completion of the road, and all such lands of every description shall be subject to all limitations and conditions now by law existing in relation thereto and as modified by this act, and this act shall not be construed to revive, enlarge, extend, or create any land grant whatever beyond that heretofore granted by Congress and which shall duly inure to said company upon compliance with the terms of this act in relation to the times fixed for completion of said railway, and all such mortgages shall be subject to all the conditions and limitations by law existing under this act and the acts to which it is supplementary in respect to such lands, and shall not be held to vest any title in the mortgage or create any lien on such lands other than such company is or may become lawfully entitled to vest or create thereunder; but the amount of said land bonds shall not exceed two and a half dollars per acre for all lands covered by the mortgage or mortgages securing the same.

SEC. 3. That all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution: Provided, that the aforesaid bonds and the authorized capital stock or the proceeds thereof shall be applied only for the purpose of securing the construction, operation, and equipment of the contemplated railroad line under lawful contracts with such parties and on such terms and conditions as said company may deem needful, and for the further purpose of purchase, consolidation, completion, equipment, and operating of the other roads as contemplated by said act and specified therein, being a part of the aforesaid railroad line, and for the expenses necessary and incident to the works authorized thereby: Provided, however, that said road and its equipment shall be of the standard heretofore required by the United

States Government for the existing Pacific railway lines: And
166 provided further, that said mortgage or mortgages shall in
nowise impair or affect any lien existing on the property of
said company or companies at or before the time of such consolidation.

SEC. 4. That said road shall be constructed of iron or steel rails manufactured from American ore, except such as may have been contracted for before consolidation by any railroad company which may be purchased by or consolidated with this company.

SEC. 5. That the said Texas and Pacific Railway Company shall commence the construction of its road at or near Marshall, Texas, and proceed with its construction under the original act and this supplement or in pursuance of the authority derived from any consolidation as aforesaid westerly from a point near Marshall and towards San Diego, in the State of California, on the line authorized by the original act, and so prosecute the same as to have at least one hundred consecutive miles of railroad from said point complete and in running order within two years after the passage of this act, and so continue to construct each year thereafter a sufficient number of miles, not less than one hundred, to secure the completion of the whole line from the aforesaid point on the eastern boundary of the State of Texas to the Bay of San Diego, in the State of California, as aforesaid, within ten years after the passage of this act; and said road from Marshall, Texas, throughout the length thereof shall be of uniform gauge: Provided, however, that the said company shall commence the construction of said road from San Diego eastward within one year from the passage of this act and construct not less than ten miles before the expiration of the second year, and after the second year not less than twenty-five miles per annum in continuous line thereafter between San Diego and the Colorado river until the junction is formed with the line from the east at the latter point or east thereof, and upon failure to so complete it Congress may
adopt such measures as it may deem necessary and proper
167 to secure its speedy completion, and it shall also be lawful for
said company to commence and prosecute the construction of
its line from any other point or points on its line, but nothing in this act contained shall be so construed as to authorize the grant of any additional lands or subsidy, of any nature or kind whatsoever, on the part of the Government of the United States: Provided, that said Texas and Pacific Railway Company shall be, and it is hereby, authorized and required to construct, maintain, control, and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points, of the same gauge as the said Texas and Pacific railroad, and that all roads terminating at Shreveport shall have the right to make the same running connections and shall be entitled to the same privileges for the transaction of business in connection with the said Texas and Pacific railway as are granted to roads intersecting therewith: Provided further, that nothing herein shall be construed as changing the terminus of said Texas and Pacific railway from Marshall, as provided in the original act.

SEC. 6. That all acts or parts of acts inconsistent with this supplement be, and the same are hereby, repealed.

Approved May 2, 1872.

168 An act supplemental to an act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the face value of all bonds hereafter issued by the Texas and Pacific Railroad Company under the provisions of an act approved March 3, 1871, shall, at the option of the company, be either in gold or other lawful money of the United States, bearing interest, at like option of the company, either in gold or other lawful money of the United States; and any mortgage heretofore executed by said company securing bonds payable in any lawful money of the United States other than gold and the bonds recited therein, and to secure which said mortgage was given, are hereby legalized, and said mortgage and bonds shall have the same effect as though they had been authorized by the act to which this is a supplement: Provided, that in all other respects the requirements of that law in regard to such mortgage and bonds have been fully complied with.

Approved March 3d, 1873.

169 An act supplementary to the act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Texas and Pacific Railway Company is hereby empowered to secure, by one or more mortgages upon the whole or any portion of its line, the construction bonds heretofore authorized to be issued and to cancel the mortgage now on record with the Secretary of the Interior, so far as the same can be done without prejudice to existing rights, and to substitute therefor the mortgage or mortgages hereby authorized, which substituted mortgages shall expressly reserve all rights which may have been acquired under the existing mortgage: Provided, that the aggregate of the said bonds to be issued under and secured by said mortgage or mortgages shall not exceed the limit heretofore fixed by Congress; and said mortgages for the division east of Fort Worth shall embrace the roads and property of the Southern Pacific Railroad Company and of the Southern Transcontinental Railway Company, heretofore merged in and consolidated with the said Texas and Pacific Railway Company under the authority and requirements of the laws of the State of Texas, and which roads so merged as aforesaid shall, for that and all other purposes, be deemed and taken to be a part of the said Texas and Pacific railway, and shall hereafter be subject to all the provisions and limitations of the act of Congress incorporating said company and of the supplements thereto: And provided further, that nothing in this act shall be construed or have the effect to entitle said corporation to any other or further rights to public lands or in any other respect as against the United States than such as by law it is now entitled to.

Approved June 22d, 1874.

170 *Charter of the Southern Pacific Railroad Company of Texas, with the Amendments Thereto.*

The Texas Western railroad charter.

An act passed February 16, 1852.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That Rufus Doane, Lucius C. Clopton, James C. Hill, William T. Scott, Willis Stewart, Samuel Bogart, E. E. Lott, L. B. Camp, James W. Throckmorton, J. D. Todd, their associates and successors, be, and are hereby, created and established a body corporate and politic, under the name and title of the Texas Western Railroad Company, with the capacity, in said corporate name, to make contracts; to have succession and a common seal; to make by-laws for its government and the regulation of its affairs; to sue and be sued; to plead and be impleaded; to grant and receive, and generally to do and perform all such acts and things as may be necessary or proper for or incident to the fulfillment of its obligations or the maintenance of its rights under this act and consistent with the constitution of the State.

SEC. 2. Said company is hereby invested with the right to locate, construct, own, and maintain a railroad commencing at a suitable point on the eastern boundary line, and thence running, by such course as said company shall decree and determine to be most 171 suitable, to El Paso, on the Rio Grande river, with the right of making, owning, and maintaining such branches of said railway as they may deem expedient.

SEC. 3. The parties named in this act are hereby appointed commissioners and invested with the right of forming and organizing said company and generally of exercising the powers of directors until directors are chosen or appointed by such persons as may subscribe to the stock of said company, when the powers of said commissioners shall cease.

SEC. 4. The capital stock of said company—to consist of all its property, real and personal, franchises, and rights to property—shall be divided into shares of $100 each, each share entitling the owner thereof to one vote, by himself or proxy, at all meetings of said company. Said shares shall be deemed personal estate, and shall be transferable by any conveyance in writing recorded by the treasurer in books kept by him at his office or in such manner as the by-laws of said company shall provide.

SEC. 5. The immediate government and direction of the affairs of said company shall be invested in a board of not less than six directors, who shall elect one of their own number as president of said company. No person shall be eligible to the office of director

unless an owner or subscriber of at least five shares of the stock of said company. The directors shall have power to fill any vacancy that may occur in said board from non-election, death, or otherwise, and may appoint a secretary, treasurer, and such other officers and agents as they may consider necessary and prescribe and require bonds for the faithful performance of their duties. They may, if not otherwise provided for by the by-laws, determine the manner of conducting all meetings, the number of members that shall constitute a quorum to do business, and to do or cause to be done all other lawful matters and things which they may deem necessary and proper in conducting the affairs of the company. They shall keep or cause to be kept accurate records of all meetings of the directors and company and accurate books of account of
172 the receipts and expenditures of the company and all other books necessary and proper to be kept by such company, which shall be open to the inspection of the stockholders. A majority of the board of directors shall have the authority of a full board, and all conveyances and contracts, in writing, executed by the president and countersigned by the secretary or any other officer or person authorized by the directors, under the seal of the company and in pursuance of a vote of said directors, shall be valid and binding.

SEC. 6. The shares may be disposed of and books opened for subscriptions thereto in such manner and on such terms as said commissioners shall determine will be for the best interests of said company; and any agreement in writing by which any person shall become a subscriber to the capital stock of said company may be enforced against him according to its terms; and if any subscriber shall fail to pay any amount due upon shares subscribed by him, according to the terms of his subscription, the directors may sell at auction and transfer to the purchaser the shares of such delinquent; and if the proceeds of sale shall not be sufficient to pay the amount due on said subscription, with interest and charges, such delinquent shall be held liable to the company for the deficiency; and if the proceeds shall exceed the amount so due, with interest and charges, said delinquent shall be entitled to the surplus.

SEC. 7. It shall be lawful for the company to enter upon and purchase or otherwise take and hold any land necessary for the purpose of establishing and constructing said railway, with all necessary depots and other buildings, and if they shall not be able to obtain said land by agreement with the owner thereof they shall pay therefor such compensation as shall be determined in the manner provided by the following section: Provided, that the land so taken for the road-bed shall not exceed two hundred feet in width and for depots and other buildings only such further width as shall be needed for such purposes.

173 SEC. 8. Any person, when land has been taken as aforesaid without agreement or satisfactory compensation, may apply to the district court of the county in which said land is situated for the appointment of, and said court shall thereupon appoint, three disinterested freeholders of the county, who shall appoint a time and

place to hear the applicant and the company, to whom shall be given by said freeholders reasonable notice of said time and place, and said freeholders shall, after being sworn and after due hearing of the parties, determine the amount of compensation, if any, to which the applicant may be entitled and make return of their award to the next succeeding term of the said court, and said award, if not rejected by said court for sufficient cause then shown, shall be entered up as a judgment of said court. In determining the question of compensation said freeholders shall be governed by the actual value of the land at the time it was taken, taking into consideration the benefit or injury done to other lands and property of the owner by the establishment of said railway, and if the amount of compensation awarded by said freeholders shall not exceed the amount offered by said company to the owner prior to said application to the court the applicant shall pay the cost of the proceedings; otherwise the company shall pay the same.

SEC. 9. It shall be the duty of the company whenever any State or county road now by law established shall be crossed by the track of said railway to make and keep in good repair good and sufficient causeways at such crossings, and in all cases where any person shall hold lands on both sides of said railway and there shall be no other convenient access from one part to the other such owner shall have the right of passage free of costs at all reasonable times across the track of said railway.

SEC. 10. This company is hereby required at all reasonable compensation to draw over the road the passengers, merchandise, and
cars of any other railroad corporation which has been or
174 may hereafter be authorized by the Legislature to enter with
their railroad and connect with the railroad of this company;
and if the respective companies shall be unable to agree upon the compensation aforesaid it shall be the duty of the president of each company to select each one man as a commissioner, and the two commissioners so selected shall choose a third in case of disagreement, neither of whom shall be a stockholder in either road or interested therein, and they shall fix the rates, which shall not be changed for one year from the time of going into effect. The said commissioners shall also fix the stated periods at which said cars shall be drawn as aforesaid, having reference to the convenience and interests of said corporations and public who shall be accommodated thereby. The right and power is especially conferred on said company to connect and contract with any railroad transport, and in case of disagreement between said companies the same shall be referred and settled as aforesaid and be binding for one year as aforesaid.

SEC. 11. Said company may acquire real estate by gift or purchase, and that such commissioners hereinbefore mentioned shall have full authority to solicit and receive subscriptions and conveyances of land to said company until the time fixed for the first meeting of said commissioners, which authority may then be extended by said meeting; which said land so obtained shall be alienated by said company in the following manner: One-fourth in six years, the one-fourth in eight years, the one-fourth in ten years, and the one-fourth in twelve years from the time the same was acquired.

SEC. 12. If the track of this railway shall cross any navigable stream it shall do it in such a way as not to obstruct its navigation.

SEC. 13. Said company shall have the right to demand and receive such rates and prices for the transportation of passengers and freight as they may think proper to establish, not to exceed
175 five cents per mile for passengers and fifty cents per hundred
pounds for freight for every hundred miles the same may be carried.

SEC. 14. If any person shall wilfully injure or obstruct said railway or its property such person may be punished, when prosecuted by indictment for said offence, in due course of law, and also liable to action by said company or any person whatever who may suffer in person or property from said willful obstructions for the amount of damages occasioned thereby.

SEC. 15. There shall be granted to said company eight sections of land of six hundred and forty acres each for every mile of railway actually completed by them and ready for use, and upon the application of the president of the company or any duly authorized agent thereof stating that any section of five miles or more of said railway has been completed and is ready for use it shall be the duty of the comptroller of public accounts to require the State engineer or a commissioner to be appointed by the Governor to examine said railway, and upon his certificate that said section of said railway has been completed in a good and substantial manner and is ready for use the comptroller shall give information of that fact to the Commissioner of the General Land Office, whose duty it shall be to issue to said company land certificates to the amount of eight sections of land of six hundred and forty acres each for each and every mile of railway thus completed and ready for use. Such certificate shall be for six hundred and forty acres each, and shall be located upon any unappropriated public domain of the State of Texas within twelve months from issuing thereof, which date shall appear upon the face of each certificate, and upon the return of the field-notes of any survey made by virtue of any certificate thus issued it shall be the duty of the Commissioner of the General Land Office to issue patents to said company in their corporate name, one-fourth of which said lands thus patented shall be alienated by the company in six years,—, one-fourth in ten years, and the other fourth in twelve years,
176 so that the whole of the lands thus granted shall pass from
the hands of the company within twelve years of the date of the patents thus issued.

SEC. 16. Said company shall be required to have a good and sufficient brake upon the hindmost car in all trains transporting passengers or merchandise, and also permanently stationed there a trusty and skillful brakeman, under a penalty not exceeding the sum of one hundred dollars for each offence, to be recovered in any court of competent jurisdiction for the benefit of the State; and said company shall cause to be placed on each locomotive engine passing on their road a bell of the weight of at least thirty-five pounds, or a steam-whistle, and the said bell shall be rung or the whistle blown at the distance of at least eighty rods from the place of crossing any highway or turnpike, and kept ringing or blowing until the engine has passed or stopped. Said company shall be required to construct their railroad with good T or U iron rails: Provided, that no land shall be donated unless the company shall actually commence their road within four years and actually complete and finish at least ten miles within five years.

SEC. 17. The first meeting of the commissioners or directors appointed by this act shall be held at Marshall, in Harrison county, on the first Monday in July next, in which and all subsequent meetings which may be held at such times and places as the directors may think best said directors may act in person or by proxy.

SEC. 18. Nothing in this act shall be so construed as to confer banking privileges or powers of any kind whatever.

SEC. 19. That if said railway shall not be commenced within five years from the passage of this act and at least twenty miles thereof are not completed within six years, then this charter shall be null and void; and it is hereby provided and declared that it shall be lawful for any other railway hereafter to be constructed to cross the said railway or any branch thereof, or to connect at any point therewith.

177 SEC. 20. The said company shall have the right to take and hold so much of the public land not exceeding two hundred feet wide as the said railway or any of its branches may pass through for the track thereof and such additional width as may be absolutely necessary for any depot or other work for the purpose of said railroad that the company may deem proper to establish; and in all cases when such railroad or any branch thereof shall pass through any public lands all such lands, to the depth of three miles from the extension line of the track on each side thereof, shall be reserved for the State from and after the time such track shall be fixed or designated by survey, recognition, or otherwise, and the said lands, as the road is constructed, shall be divided into sections fronting one mile each on the road, plainly marked; and of these reserved lands the company shall have the right, by virtue of any of the certificates issued in accordance with the provisions of this act, to cause to be located, surveyed, and patented for their use each alternate section, such section in each instance embracing a tract of land fronting one mile, pursuing an equal width, and the remaining sections shall continue the property of the State until disposed of by the Legislature.

Approved February 16, 1852.

An act to amend the caption and the first and sixteenth sections of an act to incorporate the Texas Western Railroad Company, approved February 16, 1852.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the title or caption of an act to incorporate the Vicksburg and

El Paso Railroad Company or Texas Western Railroad Company, approved February 16, A. D. 1852, be so amended as hereafter to read as follows: An act to incorporate the Southern Pacific
178 Railroad Company; and the first section of the above-recited act shall hereafter read as follows: That Rufus Doane, James C. Hill, William T. Scott, Willis Stewart, Sam. Bogart, E. E. Lott, L. B. Camp, James W. Throckmorton, J. D. Todd, Joseph McDougal, Thomas H. Rodgers, Adam Sullivan, Joshua Starr, C. B. Holbert, Mason Mosely, and Jacob Fisher, their associates and successors, be, and are hereby, created and established a body corporate and politic under the name and title of the Southern Pacific Railroad Company, with the capacity, in said corporate name, to make contracts, to have succession and a common seal, to make by-laws for its government and the regulation of its affairs, to sue and be sued, plead and be impleaded, to grant and receive, and generally to do and perform all such acts and things as may be necessary or proper for or incident to the fulfillment of its obligations or the maintenance of its rights under this act and consistent with the constitution of this State, and all the acts done by said Texas Western Railroad Company or Vicksburg and El Paso Railroad Company under the act incorporating the same or any act amendatory thereto shall be, and are hereby, declared to be as legal and binding on all the parties connected therewith and on said company under the name and title of the Southern Pacific Railroad Company as if made with said company under said name.

SEC. 2. That the sixteenth section of the act to which this is an amendment shall hereafter read as follows: Said company shall be required to have a good and sufficient brake upon the hindmost car in all trains transporting passengers or merchandise, and also permanently stationed there a trusty and skillful brakeman, under a penalty not exceeding one hundred dollars for each offence, to be recovered in any court of competent jurisdiction for the benefit of the State; and said company shall cause to be placed on each locomotive engine passing on their road a bell of the weight of at least thirty-five pounds or a steam-whistle, and the said bell shall be rung or the whistle blown at the distance of at least eighty
179 rods from the place of crossing any highway or turnpike and kept ringing or blowing until the engine has passed or stopped. Said company shall be required to construct their railroad with good T or U iron rails: Provided, that no lands shall be donated unless the company shall actually commence their road within four years and actually finish grading and furnishing cross-ties for at least ten miles within five years, and that this act shall not be construed as an extension of the time of commencement of said road, as required in the original act: Provided this road shall not under any circumstances have more than sixteen sections of land to the mile under the provisions of what is known as the sixteen-section law, and all branching privileges to be cut off and none allowed, to be subject to all the provisions of the general railroad law of this State, and the files heretofore made in the General Land Office shall not

secure any rights to said company, and that this act shall take effect from its passage.

Passed August 16, 1856.

Department of State,
Austin, Texas, *August* 20, 1856.

I, the undersigned, secretary of state of the State of Texas, hereby certify that the above and foregoing is a correct copy of the original enrolled act now on file in this department.

Witness my hand and the seal of the department the day and year above written.

EDWARD CLARK,
[L. S.] *Secretary of State.*

180 An act to encourage the construction of railroads in Texas by donations of lands.

Sec. 1. Be it enacted by the Legislature of the State of Texas, That any railroad company chartered by the Legislature of this State heretofore or hereafter constructing within the limits of Texas a section of twenty-five miles or more of railroad shall be entitled to receive from the State a grant of sixteen sections of land for every mile of road so constructed and put in running order.

Sec. 2. That any railroad company having actually put under contract as much as twenty-five miles of its road or its entire road, when the length may not exceed twenty-five miles, upon filing a certified copy of such contract with the Commissioner of the General Land Office and upon depositing with the treasurer of the State a bond, with two or more good sureties to be approved by him, in favor of the Governor of the State, in the sum of ten thousand dollars, conditional as hereinafter required, may file an application with any district surveyor of any land district in this State, a copy of which application shall in all cases be forwarded to the Commissioner of the General Land Office by the district surveyor, to survey any quantity of public domain lying and being in such district and subject to location and entry, not to exceed eight hundred sections, and said application shall especially describe the lands applied for and intended to be surveyed, and if said company shall produce and file with the district surveyor a certificate of the Commissioner of the General Land Office that a copy of its contract has been filed in said office for the construction of twenty-five miles or more of said road, and also a certificate from the treasurer that a bond as required by this act has been deposited in his office, said application
181 shall exempt the land so designated from any future location, entry, or pre-emption privilege until otherwise directed, as hereinafter provided: Provided; that no application for a survey of land under the provisions of this act shall be made for more than six months before the completion of such section, and if said section be not completed and notice thereof given as herein provided within six months from the time of the application, then such land applied for shall become subject to location and entry as if no such application had been made.

SEC. 3. That it shall be the duty of said company to cause to be surveyed the land so designated into sections of six hundred and forty acres each and in square blocks of not less than six miles, unless prevented by previous surveys or a navigable stream, which survey shall be delineated upon a map or maps, the even and odd sections being differently colored and regularly numbered from one upwards to the full number contained in the block, and the field-notes of said surveys and map or maps shall be by said company deposited with the Commissioner of the General Land Office.

SEC. 4. That the condition of the bond mentioned in the second section of this act shall be that said company will cause to be surveyed the land designated and applied for within the time limited for the construction of said section of twenty-five miles by the contract and in the manner required by the third section of this act, and shall actually construct the said section of twenty-five miles of said road within the time mentioned in said contract, in default of which said land shall become forfeit to the use of the State, which forfeiture shall be declared by the district court of Travis county, at the first term thereafter, without further formality than as hereinafter provided.

SEC. 5. That if at the time stipulated in said contract for the completion of said section of twenty-five miles the field-notes and map or maps of the land applied for be not deposited in the General Land Office, as herein required, it shall be the duty of the Commissioner to forward immediately to the treasurer of the State 182 and the district surveyor of the land district where the land applied for is situate a certificate of the fact, whereupon the land so applied for shall become subject to location and entry by any one, as if no such application had been made; and it shall be the duty of the treasurer, ten days before the session of the district court of Travis county, to cause notice of such forfeiture to be advertised in one of the newspapers published at Austin for two successive weeks; and at said session of the district court it shall be the duty of the attorney general or, in case he be not present, of the district attorney to file a motion for the forfeiture of said bond, whereupon said court shall proceed, without other citation or notice, to declare said bond absolutely forfeited, and to render judgment against said company and sureties for the amount of said bond, upon which judgment execution shall issue as in ordinary cases: Provided, that it shall be necessary for the attorney general or district attorney to file with said motion a certified copy of said bond under the hand and seal of the treasurer, and also a copy of the contract deposited in the General Land Office, and a certificate of the Commissioner that said surveys and map or maps of the lands applied for have not been returned.

SEC. 6. That any railroad company having completed and put in running order a section of twenty-five miles or more of its road may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State engineer, to examine said section of road; and if, upon report of said engineer under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter and of the general laws of the State in force at the time regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company patents for the odd sections surveyed in pursuance of the second and third sections of this act; but in case said lands or any part thereof shall not have been surveyed at the time said section is completed, then it shall be the duty of 183 said Commissioner to issue to said company certificates of 640 acres each, equal to sixteen sections per mile of road so completed; whereupon said company may apply to the district surveyor of any land district in this State to survey any quantity of vacant land subject to location and entry in such district not to exceed twice the quantity of certificates so issued, which surveys shall be made, numbered, and colored as directed in the third section of this act; and upon the return of the field-notes and map or maps of such surveys to the General Land Office and the certificates so issued it shall be the duty of the Commissioner to issue to said company patents for odd sections of said surveys: Provided, that in case the surveys are not applied for before the completion of any section of road it shall not be necessary to deposit with the treasurer a bond as required in the second section of this act.

Sec. 7. That fractional sections containing more than 320 acres shall be regarded as whole sections, and two fractional sections, each containing less than 320 acres, shall be taken as a whole section under the provisions of this act, and all the alternate or even sections shall be reserved to the use of the State until appropriated by law.

Sec. 8. That surveys under the provisions of this act may be made by persons employed by the company, and the field-notes may be deposited with the Commissioner of the General Land Office without being recorded in the office of the district surveyor: Provided, that the State in no case shall be liable for surveying any part of said lands, nor shall any company pay for the fees of patenting the odd sections as herein provided.

Sec. 9. That any railroad company in the State acquiring lands or other real estate by virtue of the provisions of this act or by virtue of the provisions of any other act or charter enacted by the Legislature of the State of Texas by purchase, donation, or otherwise shall proceed to alienate the same, except so far as may be neces- 184 sary to the maintenance and running of said road in six, eight, ten, or twelve years—that is, one-fourth shall be alienated in six years, one-fourth in eight years, one-fourth in ten years from the time of acquiring such lands or real estate, in such manner that the whole of such lands or real estate shall pass out of the hands of such company within twelve years from date of its acquisition: Provided, moreover, that said lands and real estate shall in no instance be alienated to any other corporation, except so far as may be necessary for the proper uses and the conduction of the business of such corporation.

Sec. 10. That if any company should neglect or fail to alienate its lands or real estate as herein directed, evidences of which alienations said company shall cause to be filed with the secretary of state, it shall be the duty of that officer to notify the comptroller of public accounts and Commissioner of the General Land Office of such failure to alienate; whereupon the Commissioner shall furnish the comptroller with a list of the lands acquired by said company under this or any other act of the Legislature of this State and the dates at which such lands were acquired; and the secretary of state shall also furnish the comptroller with a schedule of the lands owned and alienated by said company, as the same appears from the last annual returns made to his office by said company, in pursuance of the general law of the State regulating railway companies; and it shall be the duty of the comptroller of public accounts, immediately upon receiving said returns, to cause to be advertised in the newspapers in the city of Austin, for sale sixty days after such advertisement, the lands herein directed to be alienated, proceeding in the order in which said lands and real estate were granted or deeded to said company, and, after deducting all necessary expenses of the sale, the balance shall be deposited with the treasurer to the credit of said company.

Sec. 11. That all the alternate or even sections of land surveyed in pursuance of the provisions of this act or of any other act of the
Legislature of this State donating lands to any railroad com-
185 pany shall be reserved to the use of the State and not liable
to location entries or pre-emption privileges until otherwise
provided by law.

Sec. 12. That the provisions of this act shall not extend to any company receiving from the State a grant of more than sixteen sections of land nor to any company for more than a single-track road with the necessary turnouts; and any company now entitled by law to receive any grant of eight sections of land per mile for the construction of any railroad accepting the provisions of this act shall not be entitled to receive any grant of land for any branch road, provided this act shall not be so construed as to give any company now entitled by law to receive eight sections of land more than eight additional sections: Provided, that no person or company shall receive any donation or benefit under the provisions of this act unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act, and such donation shall be discontinued in every case where the company or companies shall not construct and complete at least twenty-five miles of the road contemplated by their charter each year after the construction of the said first-mentioned twenty-five miles of road: And further provided, that the proviso herein contained shall not extend to any railroad the terminus of which is not fixed on the Gulf coast, the bays thereof, or on Buffalo bayou, and that nothing in this section shall be so construed as to extend the duration of any existing charter: And further provided, that the certificates for land issued under the provisions of this act shall not be located upon any land surveyed or titled previous to the passage of this act: And further provided, that this act shall continue in force for the term of ten years from the time it shall take effect and no longer.

SEC. 13. That no railroad hereafter to be built shall be entitled to receive the additional sections of land herein granted unless the railings of such road shall weigh at least fifty-four pounds to the yard.
January 30, 1854.

186 I, Ed. Clark, secretary of state of the State of Texas, hereby certify that the printed copy of "An act to encourage the construction of railroads in Texas by donations of lands," hereto attached, is a correct copy of the original act now on file in the state department.

Given under my hand and seal of the department of state, at Austin, this third day of February, A. D. 1854.

ED. CLARK,
Secretary of State.

An act to provide for the investment of the special school fund in the bonds of railroad companies incorporated by the State.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the Governor, comptroller, and attorney general shall *ex officio* constitute a board of school commissioners, whose duty it shall be to draw from the treasury the special school fund created by the act of January 31, 1854, entitled An act to establish a system of schools, and such other amount as may hereafter be added to said fund, and invest the same as provided in this act; and said board shall annually report to the Governor its acts and proceedings relative to the said school fund, which shall be laid before the Legislature at each and every session thereof.

187 SEC. 2. That the five per cent. indemnity bonds belonging to said special school fund may and shall be loaned to legally incorporated railroad companies in this State at their current value, including premium, provided said value shall not be less than par, otherwise at par, for the term of ten years from the date of said loans, at an interest of six per cent. per annum, payable annually upon the terms and conditions specified in this act, provided that one-half of said fund shall be loaned to companies whose works lie east of Trinity river and the residue to companies whose works lie west of said river.

SEC. 3. Said board of commissioners is hereby authorized to invest said funds by loaning to any such company which has been chartered for the purpose of building a railroad in this State the sum of six thousand dollars per mile for each and every mile of railroad constructed as hereinafter provided, said loans to be secured by the bonds of such company for said principal and interest, made and executed to the State of Texas in the corporate name of such company, signed by the president and countersigned by the secretary or treasurer, under the seal of such company, which bonds shall constitute a lien upon the road and charter rights of such company, including the road-bed, right of way, grading, bridges, iron rails, equipments, and masonry, and upon all the stock subscribed for in said companies, all the depots and depot stations, and all the property owned by said company as necessary for its business; and the

State of Texas, upon the execution of said bonds and by virtue of the same, shall be invested with said lien or mortgage for the payment of said bonds and the interest thereon as the same becomes due, without the necessity of any deed, special contract, or act of registration.

SEC. 4. Said board of commissioners shall loan said sum of six thousand dollars for every mile of road completed to any such company as shall have completed, in a good and substantial manner and furnished ready for actual use, a continuous section of twenty-five miles of the road of the said company and graded an additional consecutive section of twenty-five miles ready for the cross-ties and
188 other superstructure, and the same amount per mile for every additional consecutive section of ten miles which shall be so completed and graded, ready for the ties and other superstructure, and the same amount per mile for every section of ten miles which shall be so completed, and furnished, ready for use upon any railroad which shall be a continuation of or connection with any other railroad running from any adjoining State or Territory in the State of Texas, provided said road shall, together with such continuation or connection, be completed at least twenty-five miles in length, and provided that before said loan is drawn upon any completed section of ten miles an additional consecutive section of ten miles shall be graded, ready for the ties and other superstructure.

SEC. 5. That upon the application of any such railroad company to said board of commissioners for said loan, and its representations that section fourth of this act has been complied with, said board of commissioners shall appoint some competent engineer, who shall, at the expense of the company, examine the road of said company and make a full report upon the condition of the same under oath, and shall report all matters pertaining to the business of said company which he may deem useful to said commissioners in ascertaining the true condition of said road and company; and upon being fully satisfied that any section or sections of said road have been constructed and completed as provided in the fourth section of this act, and that said section or sections are not subject to any lien whatever other than such as may be created by this act in favor of the State, said board shall draw a warrant on the treasurer of the State, in the name of said company, against said special school fund for such amount of said bonds as it may be entitled to under the provision of this act, which warrant shall state on account of what work it is drawn, shall be signed by said board of commissioners, and countersigned by the governor, and delivered to the president or the duly authorized agent of said company.

189 SEC. 6. That upon the presentation of such warrant or warrants to the treasury of this State the amount of said indemnity bonds called for in the same shall be delivered and transferred according to law to the president or authorized agent of said company, his receipt taken therefor, and the same charged to the special school fund.

SEC. 7. That before said board shall deliver to said company said warrant or warrants upon the treasury it shall require said company to execute and deliver into the treasury the bonds of said company for said loan or loans in sums of not more than one hundred and fifty thousand dollars and not less than fifty thousand dollars, each payable to the State of Texas ten years after date, together with coupon bonds for the six per cent. interest thereon, payable annually, as above stated, which bonds shall be executed in the mode prescribed in the third section of this act, and shall be made payable at the office of the treasurer of the State, and which shall be a lien in favor of the State, as specified in the third section of the act, and shall have a priority over all other claims against said company; that in addition to the annual interest of six per cent. every company accepting any loan under the provisions of this act shall pay annually, at the expiration of each year from the date of the loan, the further sum of two per cent. upon the amount of the loan into the treasury of the State for the purpose of establishing a sinking fund to be applied towards the payment of the loan at its maturity, and the amount so paid for the purpose of such sinking fund, with their accumulations, shall be credited to such railroad.

Sec. 8. And after the execution of said bonds upon said first section or any subsequent constructed section it shall not be lawful for said company to give, create, or convey to any person or persons or body corporate whatever any lien, incumbrance, or mortgage of any kind which shall have priority over or come in conflict with the lien herein secured, and any such lien, incumbrance, or mortgage shall be null and void as against said lien or mortgage in favor of the State.

190 Sec. 9. That it shall be the duty of any such company, as the interest becomes due upon said bonds executed as aforesaid, to deposit the same in the treasury of the State, which amount shall be credited to the special school fund and shall be subject to the immediate appropriation for school purposes, as provided by law, and all railroad companies shall pay said interest so due by them annually, on the first day of March, out of the first receipts arising from said road, independent of any expenses or other liabilities of said roads, and the coupon bonds of such companies so satisfied shall be cancelled and delivered up.

Sec. 10. Whenever any of the bonds of said company for the principal loaned thereon shall become due said company shall deposit said sums so due in the treasury of the State, and said bonds when so paid shall be cancelled and delivered up, and said principal sum so returned into the treasury shall be credited to the special school fund and subject to reinvestment by said boards, as provided in this act.

Sec. 11. That if any such company shall fail or refuse to pay said principal or interest bonds from time to time as the same shall become due the road of said company, together with all the rights and property of said company specified in section third of this act, shall be sold or caused to be sold by the Governor of the State for the satisfaction of said bonds so due, as well as the bonds of said company which may have been given under this act to the State, and the whole of said bonds shall be deemed due if said sale takes place, and the proceeds of such sales shall be deposited in the treasury and credited to the special school fund.

SEC. 12. That upon the failure of any such company to pay said principal or interest bonds as required in this act it shall be the duty of the Governor, after the expiration of thirty days, to cause notice of the sale of such road to be advertised in some newspaper published at the seat of government for the term of three
191 months, and, after due notice has been given, shall cause the entire road, together with all the rights and property of said company specified in the third section of this act, to be sold by public auction, to the highest bidder for cash, at the door of the capitol of the State and at the time specified in said advertisement: Provided, that if the principal or interest bonds which may have become due before the giving of said notice and all costs attending said proceedings shall be paid before the day of sale, then said proceedings for sale shall be stopped.

SEC. 13. In the event of any sale of any railroad under the provisions of this act it shall be the duty of the Governor, either in person or by agent, to attend such sale and protect the interest of the special school fund, and shall, if necessary to protect said interest, buy in said road, with all the rights and property belonging to said company, in the name of the board of school commissioners, provided he shall not bid more than the amount of the bonds of said company, with the interest due thereon and the cost and expenses attending said sale, and in the event of any such purchase in the name of the board of school commissioners the Governor shall appoint a receiver, who shall be required to enter into such bonds as may be required by the Governor and whose duty it shall be to take immediate possession of and to control and manage said road under directions of the Governor until otherwise disposed of by law. The said board of school commissioners shall retain in the treasury of the State, charged to the credit of the school funds, five per cent. of the United States bonds of all sums loaned as provided in this act as a sinking fund, to be used for the "*pro rata*" appropriation annually due to the several counties for school purposes in the event of the interest due to the school fund after the sale of any railroad shall not be paid by said road.

SEC. 14. The State of Texas expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect
192 the interest of the special school fund in securing the payment of said bonds and in enforcing the lien reserved thereon.

SEC. 15. That the provisions of this act shall not extend to any railroad company which may be entitled to receive from the State a larger grant of land than sixteen sections of six hundred and forty acres to the mile for the construction of such road, nor to any road for more than a single trunk, with the necessary turnouts, nor to any branch road, nor to any road which shall not be commenced and prosecuted as required by the provisions of its charter: Provided, that no company shall be entitled to a loan under this act for any section of road between the cities of Galveston and Houston or Galvesten and the crossing of Buffalo bayou, near the city of Houston.

SEC. 16. That no railroad which is less than fifty miles in length, according to the terms of its charter, shall be entitled to the benefits of this act except on the following terms: The Brownsville and Rio Grande railroad shall be entitled to the benefits of this act on its entire length as soon as it is completed from Point Isabel to Brownsville; and any other railroad which is less than fifty miles in length, according to the terms of its charter, whenever one-half of its entire length has been completed and put in running order and the other half has been graded ready for ties and other superstructure, shall be entitled to said loan on said completed section, which shall be expended for the completion of the entire road, and in no event shall said road be entitled to said loan on more than one-half its entire length.

SEC. 17. If any person making an affidavit as herein required shall knowingly swear falsely he, upon conviction thereof before any court of competent jurisdiction, shall suffer all the pains and penalties of perjury.

SEC. 18. That it shall be the duty of any railroad company receiving the benefits of this act to make, through its proper officers, an annual report under oath to the Governor, containing a
193 full and complete statement of the affairs of said company,
together with the receipts, expenditures, and liabilities of said company, and with such other facts as may be necessary under the general laws regulating railroad and said railroad companies.

SEC. 19. That every railroad company, before it shall be entitled to the privileges of this act, shall establish upon the line of its road an office where books shall be kept showing the state of the stock and general accounts and where the company may be legally served with all notices and processes, and the superintendent or principal manager of the transportation business of the road shall reside in this State; and whenever a majority of the shares in the capital stock of the company shall be owned in this State a majority of the directors, including the president, shall be residents thereof; and that this act take effect and be in force from and after its passage.

Passed August 3, 1856.

DEPARTMENT OF THE STATE,
AUSTIN, TEXAS, *August* 20, 1856.

I, the undersigned, secretary of state of the State of Texas, hereby certify that the writing contained on the foregoing eleven pages hereto attached is a correct copy of the original enrolled act now on file in this department.

[L. S.] Given under my hand and the seal of the department, at the city of Austin, this the 20th day of August, A. D. 1856, and of the independence of Texas the twenty-first year.

EDWARD CLARK,
Secretary of State.

194 An act to amend the third section of an act entitled An act for the investment of the special school fund in the bonds of railroad companies incorporated by the State.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That section third of the above-entitled act shall be so amended as to read as follows: Said board of commissioners is hereby authorized to invest said funds by loaning to any such company which has been heretofore chartered for the purpose of building a railroad in the State the sum of six thousand dollars per mile for each and every mile of railroad constructed as hereinafter provided, said loans to be secured by the bonds of such company for said principal and interest, made and executed to the State of Texas in the corporate name of such company, signed by the president and countersigned by the secretary or treasurer under the seal of such company, which bonds shall constitute a lien upon the road and chartered rights of such company, including the road-beds, right of way, grading, bridges, iron rails, equipments, and masonry, and upon all the stock subscribed for in said companies, all the depots and depot stations, and all the property owned by such company as necessary for its business; and the State of Texas, upon the execution of said bonds and by virtue of the same, shall be invested with said lien or mortgage for the payment of said bonds and the interest thereon as the same becomes due without the necessity of any deed, special contract, or act of registration.

SEC. 2. That this act take effect and be in force from and after its passage.

Passed August 26, 1856.

195 DEPARTMENT OF STATE,
AUSTIN, TEXAS, *August* 26, 1856.

I, Edward Clark, secretary of state of the State of Texas, hereby certify the above to be a correct copy of the original enrolled act now on file in this department.

Given under my hand and the seal of the department, at the city of Austin, this the 26th day of August, A. D. 1856, and of the independence of Texas the 21st year.

EDWARD CLARK,
Secretary of State.

(CHAP. 63.)

An act for relief of railroad companies.

(Called session, twelfth Legislature.)

Enabling any railroad company indebted to the State for loans from the special school fund to avoid the sale of its road for nonpayment of principal and interest by payment into the treasury, on the first of November, 1870, of six months' interest on the aggregate amount due account of said loans, principal and interest, as said aggregate amount stood on the first of May, 1870, and by the payment in addition, on first of November, of one per cent. upon said aggregate amount, to be applied toward a sinking fund provided for said loans, and by continuing to pay into the treasury six months' interest and one per cent. on account of said sinking 196 fund semi-annually thereafter, to wit, on the first of May and November of each year. Any railroad company failing to pay amount required at the time or within ten days thereafter the whole debt, principal and interest, shall become due and the Governor shall proceed to sell the road, with all its franchises and property, so far as lien of the State covers the same to be sold. Should the Governor deem it necessary for the protection of the school fund he may buy in any road in the name of the State; providing that if the whole principal and interest which may have become due and all costs attending advertisements and proposed sale be paid before the day of sale, then proceedings shall be stopped. The State will not exact payment of the principal of the debt from any railroad not hereafter in default, excepting said payments on account of the sinking fund; but any company may pay the same in full at any time on thirty days' notice to the Governor, and said lien or mortgage of the State shall not attach to any extension of its existing road hereafter constructed.

Charter of the Southern Transcontinental Railway Company.

An act to incorporate the Southern Transcontinental Railway Company.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That John C. Fremont, George P. Buell, Henry D. Cook, Marshall O. Roberts, John W. Forney, Morton C. Hunter, Thomas A. Morris, R. M. Bishop, William Schowrele, S. W. Morton, W. Vermilye, 197 D. R. Martin, Samuel D. Hoffman, Daniel Drew, Jr., John D. Defries, J. W. Tibbens, J. P. Bowman, George Maney, Maxwell Woodhull, E. L. Fanchier, G. H. Giddings, A. W. Rice, J. R. Russell, S. D. Raney, J. G. Tracy, J. G. Dumas, and their associates, successors, and assigns be, and they are hereby, constituted a body corporate and politic, by the name and style of "The Southern Transcontinental Railway Company," with power to sue and be sued, plead and be impleaded, contract and to be contracted with, to have perpetual succession, and to adopt and have a corporate seal and to alter the same at discretion.

SEC. 2. And be it further enacted, That the object of the railway company hereby incorporated is to construct and establish a complete first-class railway line and telegraphic communication beginning at a point on the eastern boundary of the State of Texas, bordering on the State of Arkansas, at or near Texarkana, between the Sulphur Fork and Red River, and thence, as near as practicable to the route of the Memphis, El Paso and Pacific railroad survey, to or near the town of El Paso, and the mail line of said road shall follow, as nearly as may be practicable, the old survey of the Memphis and El Paso road; also to construct a branch road from Jefferson, in Marion county, in a northerly direction to the main line designated as aforesaid, on the most practicable route.

SEC. 3. And be it further enacted, That the said corporation shall have power, and it is hereby authorized, to construct, use, and maintain a railway and telegraph line from said points and branch road thereof as designated in the second section of this act, and to effect that object the said company shall have power to purchase lands or may accept any donations or grants of land and any other property whatsoever. The said company shall also have the right to purchase and enter upon any lands or other property and may issue in payment thereof the paid stock of the company, provided the land holder or owner is willing to receive the same. The said company shall also have the right to connect their road with any other road
198 chartered by the State of Texas running to or in the direction of El Paso: Provided, that said junctions shall not be with the Southern Pacific railroad at a point east of the twenty-third degree of west longitude from Washington, and after such junction, the companies mutually agreeing, one common trunk road may be constructed to the western boundary of the State, when the stock of said company may become united; and the said company hereby incorporated may purchase the rights, franchises, and property of the Memplis, El Paso and Pacific Railroad Company, heretofore incorporated by this State, and also the rights, franchises, and property of any other company incorporated by this or any other State or by the United States or any Territory, so that it may have its connection complete and continuous to the Atlantic on the east and the Pacific Ocean on the west.

SEC. 4. That the capital stock of said company shall be fixed by the board of directors at any sum not to exceed thirty millions of dollars, and shall consist of shares of one hundred dollars each, which shall be transferable in such manner as the by-laws of said company may provide. In all elections of officers of said company each share of stock shall entitle the holder thereof to one vote. No right shall vest until one million of dollars of stock shall have been subscribed in good faith and five per cent. thereof paid; and no subscriptions of stock shall be valid and legal unless two per cent. thereof is paid at the time of subscribing. The board of directors shall have the power to require full payment of all of said stock in such installments and at such times and in such manner as may be prescribed by the by-laws of said company.

SEC. 5. The persons named in the first section of this act or any nine of them shall meet in the city of New York within ninety days after the passage of this act and temporarily organize said company by electing a president, vice-president, secretary, and treasurer. The said persons shall at the same time provide for the opening
199 of the books of subscription to the capital stock of said company, and when one million of dollars of stock shall have been subscribed and five per cent. thereof paid the president of said company shall notify the stockholders to meet at a time and place to be designated by him, when a permanent organization shall be had by electing a board of directors, to consist of not less than nine,

a majority of whom shall constitute a quorum, who shall hold their offices for two years and until their successors are duly elected and qualified; and the said directors shall elect a president and vice-president from their number; also a secretary, treasurer, and such other officers as may be necessary. The said directors, at their first or any subsequent meeting, may make by-laws, rules, and regulations for the management of the business and affairs of said company, not inconsistent with the laws of this State or of the United States: Provided, that the president of the road shall appoint the chief engineer: And provided further, that due notice of the time and place of meeting for the temporary organization herein provided for shall be given by publication for at least thirty days in one newspaper published in the city of New York and in two newspapers published in Texas, one of which shall be at the city of Austin.

SEC. 6. And be it further enacted, That the right of way through the public lands of this State along the line of said road or the branch road aforesaid be, and the same is hereby, granted to said company; and the right, power, and authority are hereby conferred upon said company to take from the public lands adjacent to the line of said railway earth, timber, rock, and other materials for the construction thereof. The said right of way is granted to said railway company to the extent of two hundred feet in width where it passes over public lands, including all necessary grounds or stations, buildings, workshops, switches, side tracks, turn-tables, and water stations, not to exceed forty acres at any one point. When the line of said road or the Jefferson Branch thereof shall pass through the lands of private persons the right of way is hereby secured to said company in accordance with the laws of this State; and the
200 said company is also empowered and the right is hereby
granted to said company to cross other roads and to bridge all streams on said route so as not to interrupt the navigation thereof.

SEC. 7. And be it further enacted, That the said company hereby incorporated shall construct and have in complete running order at least one hundred miles of said road or the branch thereof, beginning at Jefferson, within two years after the passage of this act and fifty miles each year thereafter, and in default thereof shall forfeit all rights under the provisions of this act.

SEC. 8. And be it further enacted, That the said company shall have the right to construct the branch road herein provided for to the main line, and thence on said main line in the direction of El Paso, or the said company may begin the work at a point on the eastern boundary of the State and thence proceed to construct a road in the direction of El Paso at its option, as well as a telegraph upon said road so constructed: Provided, however, that any portion of said road which has not been constructed within ten years after the passage thereof, as well as the franchises thereto, shall be forfeited to the State: Provided further, that no portion of said road constructed and in complete running order shall be forfeited except what is provided for in this act: Provided further, that the branch road herein authorized shall not intersect with the Southern Pacific railroad east of the twenty-third degree of longitude west from Washington.

SEC. 9. And be it further enacted, That this act shall be in force from and after its passage.

Approved July 27th, 1870.

201 An act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean.

Whereas the State of Texas has heretofore, at different periods, incorporated three different companies with power to construct a railway from the eastery boundary of the State to El Paso, on the Rio Grande, to wit, the Southern Pacific Railroad Company, the Memphis, El Paso and Pacific Railroad Company, and the Southern Transcontinental Railway Company; and

Whereas the object of the State in these several acts of incorporation has ever been to secure the construction through the State of a railway connecting the railway system of the Atlantic States with the Pacific Ocean; and

Whereas there is reason to believe that the said The Southern Transcontinental Railway Company will succeed by contract to the rights, franchises, and property of the said The Memphis, El Paso and Pacific Railroad Company, and that the time has come when, by concert of action between all of the said companies and by the aid of the Government of the United States, the great object of a railway to the Pacific Ocean through the State of Texas may be attained; and

Whereas the speedy construction of said railway through the State of Texas would greatly enhance the value of the public lands, develop the mineral resources of the State, and give protection and security to the frontier by expelling therefrom the bands of hostile Indians by whom the western settlements are now continually scourged; and

Whereas these objects warrant and demand the most liberal legislation on the part of the State: Therefore,

202 SECTION 1. Be it enacted by the Legislature of the State of Texas, That in order to secure and promote the speedy construction of a railway through the State of Texas to the Pacific Ocean, and thereby secure the incidental advantages of cheap transportation for immigrants to the western and unsettled portions of the State, facility of communication between the eastern and western boundaries, the settlement and enhancement in value of the now unoccupied public domain, and the development of the great mineral, agricultural, and stock-raising resources of the State, the State of Texas hereby consents, binds, and obligates itself to donate, and does hereby grant, to the Southern Pacific Railroad Company and to the Southern Transcontinental Railway Company, heretofore chartered by the Legislature of the State of Texas, the bonds of the State of Texas to the amount of six millions of dollars in the manner and upon the terms and conditions following, to wit: To the Southern Pacific Railroad Company there are hereby granted the bonds of the State to the

amount of three millions of dollars, and to the Southern Transcontinental Railway Company there are hereby granted the bonds of the State to the amount of three millions of dollars, upon the condition that the said companies, within six months after the passage of this act, will agree upon a point of junction of the two roads, which said point of junction shall be west of the longitude of the eastern boundary line of Shackelford county and between the thirty-second and thirty-third parallels of north latitude, and shall file such agreement, duly executed by the two companies, in the form of an indenture between the two companies, in the office of the secretary of state of the State of Texas. The said The Southern Pacific Railroad Company shall build its road from the present western terminus thereof at Longview, in Upshur county, by the most practicable route, to the city of Tyler, in Smith county, so that the said road shall pass within one-half mile of the court-house in said city, and
from the said city of Tyler the said road shall be built west-
203 wardly, so as not to depart more than five miles from a due
west course, until it shall cross the Brazos river, and the said road shall be built from said Brazos river by the most practicable route to the point of junction; and the said The Southern Transcontinental Railway Company shall build its road from Jefferson to a point on the eastern boundary line of the State of Texas, bordering on the State of Arkansas, at or near Texarkana, and thence to the point of junction, confining its line, as nearly as may be practicable, to the old survey of the Memphis, El Paso and Pacific Railroad Company. The said companies, within twelve months after the passage of this act, shall make a survey of the route of each of the said roads to the said point of junction, and shall file a map of the said routes in the general land office at Austin and in the office of the secretary of state, and the distances between the principal points along said routes to the said point of junction shall be carefully noted on said map.

Sec. 2. The bonds in the foregoing section granted shall be of the denomination of one thousand dollars each, payable to the company which may be entitled under the provisions of this act to receive them or bearer in thirty years from the date thereof, with interest at the rate of eight per centum per annum, payable semi-annually, viz., on the first day of January and the first day of July of each year, said bonds to have coupons attached for each installment of interest to become due, which said coupons shall be made payable upon presentation at the city of New York, through such agent or agents of the State as the Governor of the State may select and appoint to pay the same; the said bonds shall be signed by the Governor and the treasurer of the State of Texas, shall have the seal of the State affixed to them, and shall be countersigned and registered by the comptroller of public accounts.

Sec. 3. Unless and until adequate means shall be otherwise provided by law for the payment of the current interest and two per
centum as a sinking fund for the redemption of the principal
204 of the bonds that may be issued under the provisions of this
act the comptroller of public accounts shall cause to be

assessed a tax upon all taxable property, real and personal, in the State and upon all occupations, proportioned to the taxes levied by general law on such property and occupations, sufficient annually to pay the accruing semi-annual interest on the bonds that may be issued under the provisions of this act and two per centum as a sinking fund, which said sum shall be assessed and collected and deposited in the treasury of the State, subject to the order of the Governor, to meet the payment of the interest coupons and the principal of said bonds as soon as and whenever the same shall become due: Provided, that no greater tax shall be assessed and collected by authority of this section than may be needed from time to time to pay said interest and sinking fund: And provided further, that whenever adequate means shall be otherwise provided by law for the payment of the said interest and sinking fund this section shall have no further force or effect, nor shall any tax whatever be assessed or collected by authority of this section until the bonds granted by the first section shall have been issued in accordance with the provisions of the various sections of this act.

SEC. 4. None of the bonds hereinbefore provided for shall be issued or delivered to either of the said railroad companies until both of the said roads shall be completed to the point of junction fixed in the first section of this act; and upon the completion of both of the said roads to the said point of junction the whole amount of the bonds hereinbefore granted shall be delivered to the said companies respectively unless the Legislature of the State shall have substituted for said bonds a grant of the public lands, as hereinafter provided: Provided, that before issuing and delivering any of the said bonds to the said companies or either of them the Governor of the State shall have such evidence as may be satisfactory to him or such as may be prescribed by law that both of the said roads have been completed to the said point of junction and are then open to the use of the public.

205 SEC. 5. Whenever the Legislature of the State shall have power under the constitution of the State to grant the public lands of the State in aid of internal improvements it shall be competent for the Legislature (if it shall think proper to do so) to substitute for the bonds hereinbefore granted a grant of the public lands to each of the said railroad companies to the amount of twenty-four sections to each of said companies for each mile of road built by the said companies respectively, after the passage of this act, to the said point of junction.

SEC. 6. If the Legislature of the State shall not have substituted a grant of public lands for the said bonds, as is provided for in the foregoing section, before the said road shall be completed to the said point of junction, then the said bonds shall be issued and delivered to the said railroad companies, as is hereinbefore provided, but upon the fundamental condition, which shall be expressed in the face of said bonds, that the State of Texas shall, at any time before the maturity of said bonds and when the State shall have the power so to dispose of the public lands, have the right to redeem the said bonds by a grant of the public lands to the holder or holders of said bonds at the rate of fourteen hundred and forty acres for each bond; and if the State shall at any time so redeem the said bonds there shall be granted and issued to the holder of each bond, upon the surrender of the same to the State, three certificates for lands, two of which shall be for six hundred and forty acres each and the other for one hundred and sixty acres, and the parties receiving the said certificates in lieu of a bond surrendered shall have the right to locate the same upon any part of the then unappropriated public domain, free from all conditions whatsoever, except the payment of such office fees as may be prescribed by law for the issuance of certificates and patents in all other cases.

SEC. 7. If the Legislature shall at any time make provisions for the redemption of the said bonds with lands, as is provided for
in the next preceding section, the State shall give at least
206 four months' notice to the holders of said bonds by adver-
tisement published in at least one newspaper of general circulation in the city of New York and at least two newspapers of general circulation published in the State of Texas, which said newspapers shall be selected by the Governor of the State; which notice shall require the holders of said bonds to surrender the same at any time within two months after the expiration of the four months' advertisement to the treasurer of the State for cancellation: Provided, that the treasurer of the State shall in every case receipt to the holder for the bonds so surrendered: And provided further, that bonds so surrendered shall not be cancelled until the land certificates in lieu of said bonds shall be actually delivered to the interested party.

SEC. 8. The said railroad companies shall take no benefit whatever under the provisions of this act, but the same shall be null and void, unless the said railroads shall be completed to the said point of junction by the first day of January, A. D. 1874.

SEC. 9. Nothing in this act contained shall be construed to impair, diminish, or in any manner to affect injuriously any right enjoyed by either of the said railroad companies under existing laws.

SEC. 10. Any provision of any former law inconsistent with the provisions and intent of this act shall be controlled by the provisions of this act.

SEC. 11. All the rights, benefits, and privileges granted and intended to be secured by this act to the Southern Pacific Railroad Company and to the Southern Transcontinental Railway Company shall pass to and vest in the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States by an act of Congress approved March third, A. D. one thousand eight hundred and seventy-one, whenever the said Southern Pacific Rail-
road Company and the said Southern Transcontinental Rail-
207 way Company shall have been consolidated with the said
Texas Pacific Railroad Company, and authority is hereby given to the said Southern Pacific Railroad Company, the said Southern Transcontinental Railway Company, and the said Texas Pacific Railroad Company to consolidate on such lawful terms and conditions as may be agreed upon between the said companies and

be ratified by a majority of the stockholders of each of the corporations so consolidating: Provided, however, that the said Texas Pacific Railroad Company shall take no benefit whatever, under or by virtue of this act, until the said company shall have fully performed all the conditions imposed by this act upon the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company.

SEC. 12. This act shall take effect and be in force from and after its passage.

Passed May 24th, 1871.

An act amendatory of and supplementary to an act entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean, passed on the twenty-fourth day of May, 1871."

SECTION 1. Be it enacted by the Legislature of the State of Texas, That section one of the above-entitled act shall be so so amended as to read as follows:

SEC. 1. Be it enacted by the Legislature of the State of Texas, That in order to secure and promote the speedy construction of a railway through the State of Texas to the Pacific Ocean, and thereby secure the incidental advantages of cheap transportation for emigrants to the western and unsettled portion of the State, facilities of communication between the eastern and western 208 boundaries, the settlement and enhancement in value of the now unoccupied public domain, and the development of the great mineral, agricultural, and stock-raising resources of the State, the State of Texas hereby consents, binds, and obligates herself to donate and does hereby grant to the Southern Pacific Railroad Company and to the Southern Transcontinental Railway Company heretofore chartered by the Legislature of the State of Texas the bonds of the State of Texas to the amount of six millions of dollars in the manner and upon the terms and conditions following, to wit: To the Southern Pacific Railroad Company there are hereby granted the bonds of the State to the amount of three millions of dollars and to the Southern Transcontinental Railway Company there are hereby granted the bonds of the State to the amount of three millions of dollars, upon the condition that the said companies shall, before the first day of June, A. D. 1872, agree upon a point of junction of the two roads, which said point of junction shall be within three miles of the junction of the West Fork and Clear Fork of the Trinity river and on the south side of said rivers, and shall file such agreement, duly executed by the two companies, in the form of an indenture between the two companies, in the office of the secretary of state of the State of Texas. The said Southern Pacific Railroad Company shall build its road from the present western terminus thereof at Longview, in Upshur county, by such route as the said company may deem the most practicable, crossing the Central railroad within one mile of Browder's Spring to the said point of junction, and the said Southern Transcontinental Railway Company shall build its road from Jefferson to a point on the eastern boundary of the State of Texas bordering on the State of Arkansas, at or near Texarkana, and thence through the town of Clarksville, in Red River county, and through the city of Paris, in Lamar county, to the point of junction, confining its line as near as may be practicable to the old survey of the Memphis, El Paso and Pacific Railroad Company; and 209 for the purpose of more certainly and conveniently transporting the material necessary to the construction of its said road as above defined the said Southern Transcontinental Railway Company shall have the right to construct a railway from the town of Marshall, in Harrison county, to Jefferson, which shall be a part of the railway of the said company: Provided, that the said company shall not be entitled to apply any part of the subsidy herein granted to the said road from Marshall to Jefferson. The said companies, by the first of September, 1872, shall make a survey of the route of each of the said roads to the said point of junction, and shall file a map of said route in the general land office at Austin and in the office of the secretary of state, and the distances between the principal points along said routes to the said point of junction shall be carefully noted on said maps.

SEC. 2. That section four of said act be so amended as to read as follows: The bonds hereinbefore provided shall be issued and delivered to the said railroad companies or either of them which may be entitled to receive the same in the following manner, to wit:

When either of said companies shall complete, equip, and put in running order twenty-five consecutive miles of its said line of road and the chief engineer of said company shall certify the same to the Governor of the State under oath it shall then be the duty of the Governor to detail such officers as may be prescribed by law or appointed by the Governor for that purpose to examine the same, and upon the written report of such officer that the said twenty-five miles of such railroad have been completed in a thorough and substantial manner it shall then be the duty of the Governor to issue and deliver to the said company the bonds herein provided for to the amount of ten thousand dollars per mile for each and every mile of said twenty-five miles of said road. Then and thereafter, so soon and so often as said companies or either of them shall complete ten miles of their road and equip and put the same in running order, it 210 shall be the duty of the Governor to deliver to said companies respectively the bonds hereinbefore provided at the rate of ten thousand dollars per mile for each and every mile of the said roads in a like manner and under the same restrictions as hereinbefore provided until the said roads shall be completed to said point of junction.

SEC. 3. That section five of said act be so amended as to read as follows: "That the Legislature of the State of Texas, if vested with the constitutional power to do so, may at any time before the first day of January, A. D. 1874, substitute for the bonds hereinbefore donated a grant of the public lands of the State to the amount of twenty-four sections to the mile to each of said companies respectively for each and every mile of road built by said companies respectively after the passage of this act in lieu of said bonds in a like manner and under the same restrictions as provided in this act: Provided, that if any of the bonds herein provided shall be issued before the Legislature shall make such substitution, then said bonds shall be redeemed and cancelled, as provided in sections six and seven of this act: And provided further, that if the Legislature shall not have made such substitution of lands for the said bonds by the first day of January, 1874, then the said company shall have the right at any time thereafter, when the Legislature shall have power to grant the public lands in aid of internal improvements, to deliver to the Governor of the State any bonds which may have been delivered to them under the provisions of this act, and shall receive therefor a grant of the public lands to the amount and in the manner provided in section six of this act.

SEC. 4. That section eight of said act shall be amended so as to read as follows: That should either of said companies fail to complete its road to the said point of junction by the first day of January, 1874, then said companies shall thereafter take no further benefit under the provisions of this act.

SEC. 5. That the said Southern Pacific Railroad Company and the Southern Transcontinental Railway Company are hereby
211 empowered to conform the gauge of their several roads to such gauge as may be adopted by the Texas Pacific Railroad Company, chartered under act of Congress of the United States March 3d, eighteen hundred and seventy-one.

SEC. 6. That it is the intent and purpose of this act and of the act *to* which this act is amendatory that each of the said railroad companies shall be entitled to three millions of dollars of said bonds, and that neither of said companies shall receive more than ten thousand dollars per mile for the construction of their roads to the said point of junction, and the said companies shall be entitled to receive ten thousand dollars per mile for a single-track railroad westward from the point of junction towards El Paso until the whole amount of bonds granted shall be consumed, but in no event shall the amount of bonds to be issued under the provisions of the act of which this act is amendatory exceed six millions of dollars: Provided, that the said companies, after reaching the said point of junction, shall construct the single track westward towards El Paso at the rate of one hundred miles per annum until the whole amount of the subsidy shall be exhausted, failing to do which the said companies shall forfeit all right to any subsidy beyond the said point of junction.

SEC. 7. The said railroad companies shall be subject to no limitation of time in the construction of their roads other than is provided in this act and the act of which this act is amendatory.

SEC. 8. Anything contained in the act of which this is amendatory and in other laws or parts of laws contrary to or inconsistent with the provisions of this act is hereby repealed, and this act shall take effect from and after its passage.

Passed Nov. 21, 1871.

212 *Agreement Fixing the Point of Junction.*

This indenture, made this sixth day of May, one thousand eight hundred and seventy-two, between the Southern Transcontinental Railway Company and the Southern Pacific Railroad Company, as consolidated in the manner hereinafter named, and the Texas and Pacific Railway Company, witnesseth:

Whereas the Southern Transcontinental Railway Company, a corporation created under the laws of the State of Texas, and the Southern Pacific Railroad Company, a corporation created under the laws of the same State, are by the laws of Texas required to agree upon a point of junction between the two roads within three miles of the junction of the West Fork and Clear Fork of the Trinity river and on the south side of said rivers; and whereas the said Southern Pacific railroad has become consolidated with the Texas Pacific Railroad Company; and whereas since the said consolidation the said Texas Pacific Railroad Company has been changed in name by act of Congress to the Texas and Pacific Railway Company:

Now, therefore, the Transcontinental Railway Company and the Texas and Pacific Railway Company (in which latter corporation the said Southern Pacific Railroad Company is consolidated) hereby agree that the junction of the said roads shall be made at a point within three miles of the junction of the West Fork and Clear Fork of Trinity river, which exact point of junction is designated on the map marked A, hereto attached and made part of this indenture.

213 The consideration of this indenture is one dollar paid by each party to the other and the mutual advantages of the parties hereunto.

In witness whereof the said Transcontinental Railway Company and the Texas and Pacific Railway Company have interchangeably executed this indenture by the subscriptions of the proper officers of each of the said corporations and by affixing the seals of the said companies.

And the said Southern Pacific Railroad Company joins in this indenture, and by its proper officers executes the same and affixes its corporate seal thereto.

For the Southern Transcontinental Railway Company:
THOS. A. SCOTT, *President.*
Attest: E. B. HART, *Sec'y.*

For the Southern Pacific Railroad Company:
THOS. A. SCOTT, *President.*
Attest: JNO. P. GREEN,
Sec'y pro tem.

For the Texas and Pacific Railway Company:
THOS. A. SCOTT, *President.*
Attest: E. B. HART, *Sec'y.*

Deed of Conveyance.

Southern Pacific Railroad Company to the Texas Pacific Railroad Company.

214 This indenture, made the twenty-first day of March, in the year one thousand eight hundred and seventy-two, between the Southern Pacific Railroad Company, a corporation created by and under the laws of the State of Texas, party of the first part, and the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States, party of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of three million dollars, lawful money of the United States, in hand paid at or before the ensealing and delivery of these presents in the manner hereinafter stated, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, assign, transfer, convey, and confirm, unto the party of the second part and to their successors and assigns all the franchises, track, road-bed, lands, buildings, rolling stock, engines, tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title, and interest in or to any franchises or property, real or personal, and all rights of every name and kind which the party of the first part posseses or in which the party of the first part has any right, privilege, or interest situate and being in the States of Texas, Louisiana, or elsewhere; to have and to hold the same, with all the appurtenances, unto the said party of the second part, their successors and assigns forever, the object and purpose of this indenture being to consolidate the said corporations into one by the sale of the Southern Pacific Railroad Company and all its property, rights, and franchises unto the said Texas Pacific Railroad Company, so that the two corporations thus consolidated in accordance with the laws under which they were created may become one by merging the said Southern Pacific Railroad Company into the said Texas Pacific Railroad Company.

215 The consideration above mentioned is to be three millions of dollars of seven per cent. land-grant bonds, which are to be a part of those secured by mortgage on all the lands that the consolidated Texas Pacific Railroad Company will own and control within the State of Texas, whether coming from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, or the State of Texas, or from any other source whatsoever, provided said lands are situated in the State of Texas. The said land-grant bonds have forty years to run from July 1, 1872, and are to be convertible, at the option of the holder, within two years after their date, into eight per cent. bonds of the State of Texas, issued by said State to the said Southern Pacific Railroad Company and to the said Southern Transcontinental Railway Company, or into the land certificates of the State of Texas which the Texas Pacific Rail-

road Company may then hold instead of said Texas bonds; and the said Texas Pacific Railroad Company hereby assumes the floating debt of the said Southern Pacific Railroad Company not to exceed in amount the sum of $700,000, and also assumes the debt of said company due to the State of Texas not to exceed the sum of $250,000.

And the parties of the first and second parts by these presents do hereby consolidate and become one railroad under the corporate name of the Texas Pacific Railroad Company.

In witness whereof the parties hereunto have mutually executed this indenture under the corporate seals of the said companies and attested by the signatures of the proper officers of the same the day and year first above written.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
By THOMAS A. SCOTT, *President.*

JNO. P. GREEN, *Secretary pro tem.*

THE TEXAS PACIFIC RAILROAD COMPANY,
By THOMAS A. SCOTT, *President.*

E. B. HART, *Secretary.*

216 *Deed of Conveyance.*

Southern Transcontinental Railway Company to the Texas Pacific Railroad Company.

This indenture, made the thirtieth day of March, in the year one thousand eight hundred and seventy-two, between the Southern Transcontinental Railway Company, a corporation created by and under the laws of the State of Texas, party of the first part, and the Texas Pacific Railroad Company, a corporation created by and under the laws of the United States, party of the second part, witnesseth: That the said party of the first part, in consideration of the sum of one million dollars, lawful money of the United States, in hand paid at or before the ensealing and delivery of these presents in the manner hereinafter stated, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, assigned, transferred, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, assign, transfer, convey, and confirm, unto the party of the second part and to their successors and assigns all the franchises, track, road-bed, lands, buildings, rolling stock, engines, tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title, and interest in or to any franchise or property, real or personal, and all rights of every name and kind which the party of the first part possesses or in which the party of the first part has any right, privilege, or interest, situate and being in the States of Texas, Louisiana, Arkansas, or elsewhere; to have and to hold the same, with all the appurtenances,

unto the said party of the second part, their successors and assigns forever, the object and purpose of this indenture being to consolidate the said corporations into one by the sale of the Southern Transcontinental Railway Company and all its property, rights, and franchises unto the said Texas Pacific Railroad Company, so that the two corporations, thus consolidated in accordance with the laws
under which they were created, may become one by merg-
217 ing the said Southern Transcontinental Railway Com-
pany into the said Texas Pacific Railroad Company. The consideration above mentioned is to be one million of dollars of seven per cent. land-grant bonds of the Texas Pacific Railroad Company, which are to be a part of those secured by mortgage on all the lands that the consolidated Texas Pacific Railroad Company will own and control within the State of Texas, whether coming from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the State of Texas, or from any other source whatsoever; provided said lands are situated in the State of Texas. The said land-grant bonds have forty years to run from July 1, 1872, and are to be convertible, at the option of the holder, within two years from their date into eight per cent. bonds of the State of Texas, issued by said State to the said Texas Pacific Railroad Company, or into the land certificates of the State of Texas which the Texas Pacific Railroad Company may then hold, instead of the said Texas bonds, in consideration of the building of the line from Texarkana to a point of junction at or near Fort Worth, in said State of Texas; the said Southern Transcontinental Railway Company to be free and clear of all debts and obligations of every nature and kind whatever, except for expenditure incurred and made in the construction of the Sulphur River bridge on said line and engineering expenses incident to survey since January 1, 1872; and the parties of the first and second parts by these presents do hereby consolidate and become one railroad under the corporate name of the Texas Pacific Railroad Company.

In witness whereof the parties hereunto have mutually executed this indenture under the corporate seals of the said companies and attested by the signatures of the proper officers of the same.

THE SOUTHERN TRANSCONTINENTAL RAILWAY COMPANY,
By THOMAS A. SCOTT, *President.*

E. B. HART, *Secretary.*

THE TEXAS PACIFIC RAILROAD COMPANY,
By THOMAS A. SCOTT, *President.*

E. B. HART, *Secretary.*

218 (An act of the Legislature of Texas passed May 2, 1873.)

An act to adjust and define the rights of the Texas and Pacific Railway Company within the State of Texas, in order to encourage the speedy construction of a railway through the State to the Pacific Ocean.

Whereas by the terms and conditions of an act entitled "An act to encourage the speedy construction of a railway through Texas to the Pacific Ocean," passed May 24th, 1871, and an act supplementary and amendatory thereto, passed November 25th, 1871, authority was given to the Southern Transcontinental Railway Company and to the Southern Pacific Railroad Company, incorporations created by acts of the Legislature of the State of Texas, to become consolidated with the Texas Pacific Railroad Company, an incorporation created by an act of the Congress of the United States; and

Whereas it appears, from documentary evidence on file in the office of the secretary of state of the State of Texas, that such consolidation has been effected, and as a difference of opinion may arise as to the construction of the acts of the Legislature hereinbefore referred to in regard to the amount of lands to which said Texas and Pacific Railway Company may be entitled under the said acts of incorporation and other laws of this State; and

Whereas it is desirable that there should be a complete and final adjustment of the rights of said Texas and Pacific Railway Company, as the assignee and successor of the said Southern Pacific Railroad Company and the said Southern Transcontinental Railway Company, under the laws of this State; and a definitive
219 understanding as to the obligations of the State; and to the further end that said company be encouraged to the speedy construction of said railway: Therefore

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the Texas and Pacific Railway Company, a corporation created by an act of the Congress of the United States, as the successor of the Southern Transcontinental Railway Company, a corporation created by an act of the Legislature of the State of Texas approved July 27th, 1870, shall construct its road from the town of Marshall, in Harrison county, to the city of Jefferson, thence in a northerly direction to a point in Bowie county not exceeding six miles west from Texarkana, at which point to intersect with its main line, which shall be constructed from or near Texarkana, on the Arkansas line, through the towns of Clarksville, Paris, Honey Grove, Bonham, and to Sherman, by the first day of July, 1874; thence through the towns of Pilot Point and Denton to the point of junction with the Southern Pacific Railroad line at Fort Worth, by the first day of January, A. D. 1875, and shall erect passenger and freight depots within one-half mile of the business portions of said towns; provided said towns, respectively, shall donate to said company the necessary lands for right of way, side tracks, switches, and depot buildings, not to exceed in each case twenty acres: Provided, that said depots shall be erected in the towns of Bonham, Sherman, Pilot Point, and Denton upon the grounds now agreed upon and donated

to said railroad company by said towns: And provided further, that said railway company shall commence the grading of their railroad in the county of Denton within ninety days from the passage of this act, and shall continuously prosecute the same until the said road shall be graded between the towns of Sherman and Fort Worth; and the said Texas and Pacific Railway Company, as the successor of the Southern Pacific Railroad Company, a corporation created by the laws of the State of Texas, shall construct its road from its present western terminus at Longview, in Upshur county, as now located, through the
220 town of Dallas to the point of junction at Fort Worth
by the first day of July, 1874; and said Texas and Pacific Railway Company shall construct a single-track railroad from the said point of junction at Fort Worth westwardly on the most practicable route to a point not less than one-fourth nor more than one-half mile from the court-house in the town of Weatherford, in Parker county, at which point said company shall establish and maintain a freight and passenger depot, provided it shall not be obligatory upon said company to go by said town and establish said depot, in the event the said town of Weatherford fails to give said company, free of charge, twenty-five acres of land, the same to be designated by the said company, for the purpose of depot buildings, track, sidings, switches, and turnouts, and also give, free of charge, the right of way through the said town and a track of twenty-five acres of land situated on the line of said railroad and within one and a half miles of the court-house in said town, and thence westwardly on the most practicable route to the Rio Grande river, at a point in the county of El Paso opposite the town of El Paso, in Mexico, and said single-track railroad shall be constructed from the said point of junction at Fort Worth at the rate of one hundred miles per annum until it reaches the Rio Grande river, provided said road shall be completed and put in running order to the main line of the Transcontinental road near Texarkana, or from such point on said line as the railroad now being constructed from Little Rock to a junction with said Transcontinental road may cross the Arkansas State line, the same not being more than seven (7) miles north of Texarkana, by January, 1874, and shall build and maintain a depot within one-half mile of the town of Clarksville, in Red River county.

SEC. 2. That the State of Texas hereby grants and donates to the said Texas and Pacific Railway Company twenty sections of land, of six hundred and forty acres each, for every mile of its road completed in good substantial running order in the State of Texas—that is to say, on the branch road from Marshall to Jefferson
221 by August, 1873, and from Jefferson to the main line of the
Southern Transcontinental road, in Bowie county, and from or near Texarkana or to the point of junction of the Transcontinental road, on the Arkansas State line, with the railroad now being constructed from Little Rock, thence to Fort Worth and from Longview to Fort Worth and from Fort Worth to the Rio Grande river, opposite El Paso, in Mexico, provided the said road shall be con-

structed from Marshall, by Jefferson, on the line hereinbefore designated, to Sherman by the first day of July, 1874, and the grading be commenced in the county of Denton within ninety days from the passage of this act and be continuously prosecuted until the said grade is finished between Sherman and Fort Worth and the road completed and put in running order to Fort Worth by the first day of January, 1875, and the road from Longview to Fort Worth shall be completed and put in running order by the first day of July, 1874, and the single-track road westward from Fort Worth to the Rio Grande, after the first day of January, 1875, shall be constructed and put in running order at the rate of one hundred miles annually: And further provided, that should said company fail to complete either of its said lines within the manner and time hereinbefore prescribed to the point of junction it shall thereafter forfeit all right to any donations of land or reservation of lands, except upon its completed road, and should said company fail to construct its single track westward from the point of junction at Fort Worth in the time required it shall forfeit all its rights to donations or reservations of land, except upon the portion thereof completed: Provided, that in no case shall the State be in any way liable for deficiency of vacant domain.

SEC. 3. That whenever and as often as said Texas and Pacific Railway Company shall complete and put in running order a section of ten miles or more of either line of its road or of its single-track road, as hereinbefore designated, said company shall give notice thereof to the Governor of the State, and it shall be his duty to appoint some skillful engineer, if there be no State en-
222 gineer, to examine said completed road and make report
thereon, under oath, to him; it shall then be his duty, if the same is shown to have been constructed in accordance with its charter and as required by law, to report the fact to the Commissioner of the General Land Office; thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company twenty certificates for six hundred and forty (640) acres of land for each and every mile of road so completed; that all land certificates that shall issue to said company under the provisions of this act shall be located and surveyed in alternate sections—that is to say, said company shall cause to be surveyed two sections of six hundred and forty (640) acres each for each certificate, adjoining, and shall return to the General Land Office the field-notes and maps of the same, and the Commissioner of the General Land Office shall thereupon number said sections so surveyed and shall cause to be issued to said company or its assignees patents to the odd sections, the even sections being reserved to the State for the school fund: Provided, that when fractions of land of a less size than twelve hundred and eighty (1,280) acres, by reason of previous surveys, are found the same may be located, by virtue of said railroad certificates, in equal quantities; and it shall be the duty of the Commissioner of the General Land Office to designate the same as other railroad certificates and to patent one-half thereof to the company or its assignees and one-half to the State, and the residue of said certifi-

cates may be, in like manner, located elsewhere, until the same is exhausted, the State being entitled to one-half of each survey and the company to the other half: Provided, that the grant of land herein made shall not be construed to give to said company a greater number of acres of land than the amount or number of acres, computed as herein provided, for the number of miles of road within the State of Texas.

SEC. 4. That said company shall alienate the lands hereby granted and donated, except so far as may be necessary for the ordi-
223 nary uses and operating said road, as follows, viz: One-fourth thereof in eight years, one-fourth in twelve years, one-fourth in sixteen years, and the remaining fourth in twenty years from the date of the issuance of the certificates, in such manner that the whole of such lands shall pass out of the hands of said company within twenty years after the date of the certificates: Provided, that said lands shall not be alienated to any other railroad corporation, except so far as may be necessary for the proper use and the conducting of the business of such corporation, nor to any person, firm, or company in trust for said railroad company, or to any company or firm of which any officer or stockholder of said railroad company is a member, and the violation of this provision shall work a forfeiture of the rights conferred by this act, and on failure to comply with the provisions of this section and the general laws of the State on this subject, or a violation of the provisions of this section or said general laws, the said company shall forfeit all right to lands secured by this act not alienated as required by law.

SEC. 5. That the public lands heretofore reserved from pre-emption, location, and survey for the benefit of the Memphis, El Paso and Pacific Railroad Company, in what is known as the Memphis, El Paso and Pacific Railroad reservation, and as designated by the maps, plats, and field-notes now on file in the General Land Office, commencing on the eastern boundary line of the State, in Bowie county, and thence westwardly to the 23d meridian of longitude west from Washington, are hereby continued to be reserved from pre-emption, location, or survey by the holder of any land certificate or other land claim for the benefit of the said Texas and Pacific Railway Company and for the benefit of the school fund; and where the public lands therein have not already been sectionized said company shall sectionize the same and return the field-notes and maps to the General Land Office, as heretofore required, giving to the company the odd section and to the school fund the even section; and said company is hereby authorized to apply any
224 of the certificates to which it may be entitled under the provisions of this act to the odd sections within said reservation: Provided, that nothing herein contained shall be so construed as to affect or impair the legal rights of third persons: And further provided, that this reservation shall continue in force until the first day of January, 1876, and no longer.

SEC. 6. That the Memphis and El Paso reservation, from the twenty-third meridian of longitude west from Washington to the Rio Grande river, as designated by the field-notes, maps, and re-

ports from the different surveyors of the several land districts of the State, on file in the General Land Office, is hereby continued to be set aside and reserved from pre-emption, location, and survey for the benefit of said Texas and Pacific Railway Company and the school fund; and there is also hereby set aside for the same purpose, out of the public lands, such additional width of territory on each side of the said sixteen miles of reservation as will make eighty miles in width from the twenty-third meridian of longitude west to the east boundary line of New Mexico and to a point south of the southeast corner of said Territory of New Mexico—that is to say, taking the centre line of said Memphis and El Paso reservation and extending forty miles on either side thereof, and after reaching the said point south of and opposite to the southeast corner of New Mexico the said reservation of the unappropriated public domain is hereby continued eighty miles in width, extending westward to the Rio Grande and bounded on the north by New Mexico, the same to include the Memphis and El Paso reservation hereinbefore mentioned, which said reservation, as herein *continued* and set apart, shall continue to be so reserved and set apart for the purposes herein mentioned until the year 1880 and no longer: Provided, that nothing in this section contained shall impair or affect the rights of any person or persons heretofore legally acquired within said reservations: And provided, that the State of Texas shall have the right to grant the right of way, not to exceed two hundred feet in width, to any other railroad company through or across said reser-
225 vation, so long as the fee remains in the State, and to cross and connect with the road herein to be constructed.

SEC. 7. That the Commissioner of the General Land Office shall designate upon the maps of his office the reservations herein *continued* and created—from the twenty-third meridian of longitude west from Washington to the Rio Grande river.

SEC. 8. That the certificates of land to which said Texas and Pacific Railway Company may be entitled under the provisions of this act shall be located within the reservations hereinbefore *continued* and located, except one thousand certificates, of six hundred and forty (640) acres each, to be issued to said company by the Commissioner of the General Land Office upon such portion of the completed road as it may designate, and which certificates may be located upon any of the public domain of the State subject to location not included within said reservations: And provided further, that in case there is not a sufficient quantity of unappropriated public lands within said reservations to satisfy the remainder of the certificates to which said company may be entitled within the corresponding sections belonging to the school fund, then and in that event said company shall have the right to locate the balance of said certificates, with the corresponding sections for the common-school fund, upon any of the unappropriated public domain of the State subject to location: Provided, that the State of Texas shall not be held responsible for any deficit of public lands upon which to locate said certificates, and no land certificate issued under the provisions of this act which may not be located by reason of the exhaustion of the public doma shall ever constitute any claim against the State.

SEC. 9. That the above grants, donations, and reservations are made to the said Texas and Pacific Railway Company, a corporation created by an act of the Congress of the United States approved March 3d, 1871, as the assignee of and successor to the rights, privileges, and franchises of the Southern Transcontinental and
226 the Southern Pacific Railroad Companies, corporations created by the laws of Texas, with the intent and distinct understanding that the same shall be accepted by said Texas and Pacific Railway Company in full satisfaction of any claims for money, bonds, or lands to which said company might be entitled under the act entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific Ocean," passed May 24th, 1871, and *an* "An act amendatory of and supplementary thereto," passed November 25th, 1871, or by virtue of the consolidation of said Texas and Pacific Railway Company with the Southern Transcontinental Railway Company and the Southern Pacific Railroad Company or by virtue of the charters of either of said railroad companies or by virtue of any railroad franchise granted by the State of Texas, purchased or acquired by either of said companies or by the Texas and Pacific Railway Company, or by virtue of any general or special law of this State, and in full satisfaction of all claims or demands for bonds, lands, or money of said Southern Pacific and Southern Transcontinental Railroad Companies against the State of Texas; and said Texas and Pacific Railway Company shall be subject to such general laws as may be enacted by the Legislature applicable to other railroads constructed within this State, and that all the property of the said corporations or either of them now or hereafter situated in this State shall be hereafter subject to taxation by the laws of this State.

SEC. 10. That all railroads in this State constructed or that may be hereafter constructed to intersect said Texas Pacific railroad shall have a right to connect with that line; that no discrimination in regard to charges for freight or passengers or in any other matter shall be made by said Texas Pacific Railroad Company against any of the said connecting roads, but that the charges per mile as to passengers and freight passing from the said Texas Pacific railroad over any of said connecting roads or passing from any of said connecting roads over any part of said Texas Pacific railroad
227 shall be governed and controlled by the laws of this State now or hereafter to be enacted: Provided, that said connecting road or roads shall not discriminate in their charges for freight and passengers against said Texas and Pacific Railway Company, but shall carry the same at the same rates and charges as said railroad company or companies carry their own freight and passengers; and said railroad company shall not have the right or power to consolidate with or sell, rent, or lease the same to any other railroad in this State, or to purchase or lease nor enter into any combination in the nature of a partnership with any railroad in this State running parallel with the said Texas and Pacific railroad or in the

same general direction that would in any way or manner give said company the power or right to control the rates of freight and passage on said road so purchased or leased; and should the provisions of this section be violated by said company it shall work a forfeiture of the rights and privileges herein granted.

SEC. 11. That said Texas and Pacific Railway Company, by their board of directors, shall, within fifteen days from the date of approval of this act, signify to the Governor, by telegraph or otherwise, the acceptance or rejection of the terms and conditions of this act, and within thirty days from the date of approval of this act shall file a formal acceptance or rejection of the same with the secretary of state of the State of Texas.

SEC. 12. That all laws and parts of laws in conflict or inconsistent with the terms and provisions of this act be, and the same are hereby, repealed.

SEC. 13. That this act take effect and be in force from and after its passage.

Passed May 2d, 1873.

228 (*Act of the Legislature of Texas Approved April* 30, 1874.)

An act to extend the time for the construction of works of internal improvement.

Whereas, by reason of the financial crisis and the stringency of the money markets of the United States, many important works of internal improvement have been delayed, and in order to grant such reasonable extension of time as the circumstances seem to require—

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the limitation of time required by their respective charters and laws of the State for the completion of any works of internal improvement or particular sections or parts thereof be, and the same is hereby, extended and enlarged for the term of twelve months in addition to that given in their charters or laws for the completion of the same: Provided, that nothing in this act shall be so construed as to revive any charter heretofore forfeited: Provided, that this act shall not revive any right to subsidy of lands, money, or bonds now lapsed or forfeited by reason of non-compliance by any company with the terms of its charter or law by reason of which said company is entitled to any subsidy of money, land, or bonds: And provided further, that any right of any company not now lapsed or forfeited is by this act extended, provided the railway company known as the Galveston, Harrisburg and San Antonio Railway Company, chartered by an act passed July 27, A. D. 1870, shall not be entitled to the benefits of this act unless it shall build its road through the town of Seguin and establish and maintain a freight and passenger depot within one-half mile of the court-house, in said town: Provided, that the Gulf, Colorado and Santa Fé Railroad Company
229 shall not be entitled to the benefits and provisions of this act
unless said company shall run and establish a depot within a

half mile of the towns of Gatesville, in Coryell county; Hamilton, in Hamilton county, and Comanche, in Comanche county.

SEC. 2. That this act shall take effect and be in force from and after its passage.

R. B. HUBBARD,
President of the Senate.
GUY M. BRYAN,
Speaker of the House of Representatives.

Approved April 30, 1874.

RICHARD COKE, *Governor.*

(*Act of the Legislature of Texas, March* 15, 1875.)

An act to extend the time for the construction of works of internal improvement.

SECTION 1. Be it enacted by the Legislature of the State of Texas, That the limitation of time required by their respective charters and laws of the State for the completion of any works of internal improvement or particular sections or parts thereof be, and the same is hereby, extended and enlarged for the term of twelve months in addition to that given in their charters or laws for the completion of the same: Provided, that this act shall not revive any right to subsidy of lands or money or bonds now lapsed or forfeited by reason of non-compliance by any company with the terms of its charter or laws by reason of which said company is entitled to any subsidy
of money, land, or bonds; And provided further, that any
230 right of any company not now lapsed or forfeited is by this
act extended: Provided, that the extension herein granted shall not apply to any railroad or other work of internal improvement which shall not construct as much as five miles of their road within the time now prescribed by their charters or the general law granting an extension of one year's time, passed at the first session of the fourteenth Legislature: Provided further, that this act shall not apply to any railway company in whose favor any special act may be passed extending the time of construction at the present session of the Legislature: Provided, that within twelve months after the completion of the southern line of the "Texas Pacific railroad" to Fort Worth, in Tarrant county, that said company shall build, equip, and put in running order their said road to the town of Weatherford, in Parker county, and shall build, equip, and put in running order forty miles every twelve months thereafter or eighty miles each two years until the same reaches the Rio Grande river: Provided further, that the "Texas Pacific Railroad Company" shall have but six months' additional time, as now prescribed by their charter or other general law granting extensions of time to works of internal improvement, approved April 30, A. D. 1874, on that part of their line between Eagle Ford and Fort Worth and between Brookston and Texarkana: And provided further, that said company shall construct and put in running order as much as twenty miles of road between Brookston and Texarkana by the first day of

November, A. D. 1875: Provided, that if the Houston and Great Northern Railroad Company shall accept the benefits of this act that said company is hereby required to build their road to the town of Clarksville, in Red River county, as contemplated by their charter: Provided, that the company shall build forty miles of the Transcontinental Branch by the first day of March, 1877, and a like amount of forty miles each year until they make the junction at Fort Worth, in Tarrant county: Provided, that the provisions of this act shall not apply to the International Railroad Company
231 so as to give said company any longer time for the construction of its road than allowed by the act passed at this session adjusting the difference between said company and the State of Texas.

SEC. 2. That this act shall take effect and be in force from and after its passage.

R. B. HUBBARD,
President of the Senate.
GUY M. BRYAN,
Speaker of the House of Representatives.

Approved March 15, 1875.

RICHARD COKE, *Governor.*

An ordinance adopted by the constitutional convention of the State of Texas September 6, 1875, in relation to railroads.

Be it ordained by the people of Texas in convention assembled, That in view of the financial misfortunes now existing no railroad company chartered or holding grants under this State which has heretofore organized and commenced work in good faith shall be considered as having lost any of its rights, privileges, or grants prior to the close of the next session of the Legislature of this State by virtue of lapse of time between now and that time; and said Legislature shall have the power, if deemed compatible with the public interest, to grant such relief in time as may be deemed best for the interests of the State: Provided, that this ordinance shall not be so construed as to relieve railroad companies from compliance with the conditions contained in article 10 of the constitution in relation to railroads.

232

Index.

Page.
Act of Congress, March 3, 1871, incorporating the Texas Pacific Railroad Company 3
Act of Congress, May 2, 1872, changing name of Texas Pacific Railroad Company to the Texas and Pacific Railway Company 15
Act of Congress, March 3, 1873, providing for the issue of bonds payable either in gold or currency 19
Act of Congress, June 22, 1874, authorizing cancellation of old and issue of new mortgage 20

Page.
Act of Texas Legislature, February 16, 1852, incorporating Texas Western Railroad Company ---------- 21
Act of Texas Legislature, August 16, 1856, amending caption and 1st and 16th sections of act incorporating Texas Western Railroad Company, changing the name to Southern Pacific Railroad Company ---------- 28
Act of Texas Legislature, January 30, 1854, to encourage the construction of railroads in Texas by donations of lands ---- 31
Act of Texas Legislature, August 13, 1856, providing for the investment of the special school fund in railroad bonds ---- 37
Act of Texas Legislature, Aug. 26, 1856, amending 3d section of the act authorizing the investment of special school fund in railroad bonds ---------- 45
Act for the relief of railroad companies, called session, 12th Legislature ---------- 46
Act of Texas Legislature, July 27, 1870, incorporating the Southern Transcontinental Railway Company ---------- 47
Act of Texas Legislature, May 24, 1871, to encourage the speedy completion of a railway through the State to the Pacific Ocean ---------- 52
233 Act amendatory of and supplementary to the above act to encourage, etc., November 21, 1871 ---------- 58
Agreement of Southern Transcontinental Railway Company, the Southern Pacific Railroad Company, and the Texas and Pacific Railway Company, May 6, 1872, fixing point of junction ---------- 63
Deed of conveyance, March 21, 1872, Southern Pacific Railroad Company to Texas Pacific Railroad Company ---------- 64
Deed of conveyance, March 30, 1872, Southern Transcontinental Railway Company to Texas Pacific Railroad Company ---------- 67
Act of Texas Legislature, May 2, 1873, adjusting and defining the rights of the Texas and Pacific Railway Company within the State of Texas ---------- 69
Act of Texas Legislature, April 30, 1874, extending time for the construction of works of internal improvement ---------- 79
Act of Texas Legislature, March 15, 1875, extending time for the construction of works of internal improvement ---------- 80
Ordinance adopted by the constitutional convention of the State of Texas, September 6, 1875, in relation to railroads -- 82

(Here follows map marked page 234.)

235 *Proceedings Had in the Supreme Court of the State of Louisiana.*

TEXAS AND PACIFIC RAILROAD CO.
vs. } No. 10337.
SOUTHERN PACIFIC RAILWAY CO.

Transcript of appeal filed February 18th, 1889.

236 *Assignment of Errors. Filed March 14th*, 1889.

TEXAS AND PACIFIC RAILWAY CO. *et al.*
vs.
SOUTHERN PACIFIC COMPANY.
} No. 10337.

And now comes plaintiffs, appellants, and assign for error in the judgment of the lower court:

First. The court below erred in sustaining the exceptions of defendant.

Second. The court below erred in dismissing the suit.

Third. The court below erred in holding that the agreement sued upon was illegal or contrary to public policy.

Fourth. The court below erred in holding that the contract sued on violated the constitution of Texas of 1876.

Fifth. The court erred in holding that the contract sued on was affected or terminated by the act of Congress of Feb. 14th, 1887, commonly called the interstate commerce act.

Sixth. The court below erred in holding that the contract sued on violated the constitution of Texas, and it appearing that said contract largely concerned interstate commerce, the Texas constitution, as so applied by said court below, violates article one, section eight, paragraphs three and seven, of the Constitution of the United States, conferring on the Congress the power to regulate commerce among the several States and to establish post roads.

Seventh. The court below erred in holding that the contract sued on violated the constitution of Texas of 1876, and it appearing that the Texas and Pacific railway was incorporated by acts of Congress of 1871 and other acts prior to 1876, and had also contract rights conferred on it by the Legislature of the State of Texas prior to 1876, the said constitution of Texas, as applied by the court below, violates article one, section ten, paragraph one, of the Constitution of the United States, forbidding a State to pass any law impairing the obligation of contracts. 237

And for these and other errors apparent on the face of the record appellants pray that the judgment of the lower court be reversed and the exceptions of the defendant overruled and the cause remanded, and for general relief.

(Signed) HOWE AND PRENTISS, *Att'ys.*

Answer to Appeal. Filed March 27th, 1889.

TEXAS AND PACIFIC RAILWAY CO.
vs.
SOUTHERN PACIFIC CO.
} No. 10337.

Now into court, through their undersigned counsel, comes the Southern Pacific Co., appellee herein, and for answer to the appeal herein taken by the plaintiffs and appellants from the judgment herein rendered against them says that there is no error in the said judgment.

Wherefore, answering said appeal, respondents pray that the judgment appealed from be affirmed with costs, and for general relief.

(Signed) LEOVY & BLAIR,
Att'ys for Defendant and Ap-ell.

Continuance.

Extract from the Minutes of April 12th, 1889.

The court was duly opened pursuant to adjournment.

238 Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, associate justices; Lynn B. Watkins, Samuel McEnery, associate justices.

TEXAS AND PACIFIC R. R. CO.
vs.
SOUTHERN PACIFIC R. R. CO. } No. 10337.

This case was called for trial, and, after hearing part argument of counsel, the same was continued for further argument.

Continuance.

Extract from the Minutes of April 13th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

TEXAS AND PACIFIC RAILWAY CO.
vs.
SOUTHERN PACIFIC R. R. CO. } No. 10337.

This case, continued from yesterday for further argument, was called for trial, and, after hearing argument of W. W. Howe, Esq., of counsel for plaintiff and appellant, and J. P. Blair, Esq., for defendant and appellee, same was continued to Monday for further argument.

Submission.

Extract from the Minutes of April 15th, 1889.

The court was duly opened pursuant to adjournment.

239 Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

TEXAS AND PACIFIC R. R. CO.
vs.
SOUTHERN PACIFIC R. R. CO. } No. 10337.

This case, continued from Saturday, April 13th, 1889, for further argument, was called for trial, and, after hearing argument of

Thomas J. Semmes, Esq., of counsel for plaintiff and appellant, the same was taken under advisement by the court.

Judgment and Decree.

Extract from the Minutes of November 18th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

His honor Mr. Justice Poche, pronounced the opinion of the court in the following case:

TEXAS AND PACIFIC R. R. Co.
vs.
SOUTHERN PACIFIC R. R. Co. } No. 10337.

Appeal from the civil district court, parish of Orleans.

Judgment affirmed.

240 *Reasons for Judgment.*

Supreme Court of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, LA., *November 18th*, 1889.

THE TEXAS AND PACIFIC RAILWAY COMPANY
versus
THE SOUTHERN PACIFIC COMPANY. } No. 10337.

Mr. Justice POCHE:

Plaintiff's object is to enforce specific performance of one of the stipulations contained in a contract or agreement executed by the two corporations on the 26th of November, 1881, and modified or amended on the 18th of February, 1885.

The agreement was entered into on the one part by several railroad companies operating in the States of Texas and Louisiana, then controlled and therein represented by Collis P. Huntington, of the city of New York, and on the other part by several similar corporations, also operating in Texas and in Louisiana, then under the control of Jay Gould, of the city of New York, and who therein acted in behalf of said companies.

The expressed object of the contract was to adjust certain differences existing between the companies represented by Huntington and those represented by Gould, and to put *at* an end to existing litigation growing out of such differences and difficulties. Hence the instrument signed by the parties and the amendment thereto subsequently made contained numerous stipulations intended to carry out the object proposed, and all having apparently been executed save one, which is the subject-matter of this controversy. That feature of the contract is in the following words: 241

Wherefore, answering said appeal, respondents pray that the judgment appealed from be affirmed with costs, and for general relief.

(Signed) LEOVY & BLAIR,
Att'ys for Defendant and Ap-ell.

Continuance.

Extract from the Minutes of April 12th, 1889.

The court was duly opened pursuant to adjournment.

238 Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, associate justices; Lynn B. Watkins, Samuel McEnery, associate justices.

TEXAS AND PACIFIC R. R. Co.
vs. No. 10337.
SOUTHERN PACIFIC R. R. Co.

This case was called for trial, and, after hearing part argument of counsel, the same was continued for further argument.

Continuance.

Extract from the Minutes of April 13th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

TEXAS AND PACIFIC RAILWAY CO.
vs. No. 10337.
SOUTHERN PACIFIC R. R. Co.

This case, continued from yesterday for further argument, was called for trial, and, after hearing argument of W. W. Howe, Esq., of counsel for plaintiff and appellant, and J. P. Blair, Esq., for defendant and appellee, same was continued to Monday for further argument.

Submission.

Extract from the Minutes of April 15th, 1889.

The court was duly opened pursuant to adjournment.

239 Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

TEXAS AND PACIFIC R. R. Co.
vs. No. 10337.
SOUTHERN PACIFIC R. R. Co.

This case, continued from Saturday, April 13th, 1889, for further argument, was called for trial, and, after hearing argument of

Thomas J. Semmes, Esq., of counsel for plaintiff and appellant, the same was taken under advisement by the court.

Judgment and Decree.

Extract from the Minutes of November 18th, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

His honor Mr. Justice Poche, pronounced the opinion of the court in the following case:

TEXAS AND PACIFIC R. R. CO.
vs. No. 10337.
SOUTHERN PACIFIC R. R. CO.

Appeal from the civil district court, parish of Orleans.

Judgment affirmed.

240 *Reasons for Judgment.*

Supreme Court of Louisiana.

CLERK'S OFFICE, NEW ORLEANS, LA., *November 18th*, 1889.

THE TEXAS AND PACIFIC RAILWAY COMPANY
versus No. 10337.
THE SOUTHERN PACIFIC COMPANY.

Mr. Justice POCHE:

Plaintiff's object is to enforce specific performance of one of the stipulations contained in a contract or agreement executed by the two corporations on the 26th of November, 1881, and modified or amended on the 18th of February, 1885.

The agreement was entered into on the one part by several railroad companies operating in the States of Texas and Louisiana, then controlled and therein represented by Collis P. Huntington, of the city of New York, and on the other part by several similar corporations, also operating in Texas and in Louisiana, then under the control of Jay Gould, of the city of New York, and who therein acted in behalf of said companies.

The expressed object of the contract was to adjust certain differences existing between the companies represented by Huntington and those represented by Gould, and to put *at* an end to existing litigation growing out of such differences and difficulties. Hence the instrument signed by the parties and the amendment thereto subsequently made contained numerous stipulations intended to carry out the object proposed, and all having apparently been executed save one, which is the subject-matter of this controversy. That feature of the contract is in the following words: 241

VI.

Mutual agreement to "pool" New Orleans and Galveston traffic and not to discriminate against Missouri termini.

It is further mutually agreed that all unconsigned business, meaning all business whereof the route has not been designated in advance destined for points west of El Paso, received by the said Texas and Pacific Railway Company, shall be turned over to the Galveston, Harrisburg and San Antonio Railway Company at the junction or to the Southern Pacific Railroad Company at El Paso, as the case may be; and all such "unconsigned" business received by the Southern Pacific companies and destined to places east of the "junction" reached by the Texas and Pacific railway and its connections north of Shreveport, La., and west of the Mississippi river, shall be delivered to the Texas and Pacific Railway Company at the "junction" or at El Paso, as the case may be. The gross earnings on all business passing over either of these roads between El Paso or the junction and New Orleans shall be divided equally, and the gross earnings on all business passing over either of these roads between El Paso or the junction and Galveston shall be divided on the basis of two-thirds thereof to the Galveston, Harrisburg and San Antonio Railway Company and its connections and one-third thereof to the Texas and Pacific Railway Company and its connections, and the agents are to divide, as nearly as possible, such business between the two through lines, so that each shall do the proportion of business above allotted.

In the event that either of the said companies of the one party, at either of the termini herein mentioned, shall be unable or shall neglect or refuse for any cause to take the business and to perform
the said service in the proportions above named, the com-
242 pany or companies of the other party shall be at liberty, so
long as such disability continues, to take such business and
perform said service, and shall be entitled to receive the compensation thereof.

The Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, the St. Louis, Iron Mountain and Southern Railway Company, the International and Great Northern Railroad Company, and the Galveston, Houston and Henderson Railroad Company shall severally take the through business any of them may have to do under this agreement between El Paso and any point on the Mississippi river, without any discrimination as to rate or otherwise in favor of any line, road, or transportation company and with equal dispatch, and this provision applies to business destined to or coming from any railroad east of the Mississippi river.

There shall be no discrimination as to local business by any of the roads of either of the parties as against those of the other party, it being understood that the term "through business," as used in this agreement, applies to traffic carried to and from terminal, common, or competitive points; and any point upon the lines of the railways of the parties hereto that may be reached directly or indirectly by any railroad competitive to either of said roads is understood to be a competitive point.

The amendment of February, 1885, in so far as this section of the contract is affected, provides a different mode of dividing the earnings. It also extends the traffic covered by the agreement to all the business between New Orleans and El Paso on the one hand and Galveston and El Paso on the other, whether the traffic originated at these points or not.

Among other stipulations which have no bearing on the issues herein involved the amendment contained the following modification:

243 "It is a part of the agreement of the parties hereto that, in consideration of the premises, the said party of the second part and his associates and the companies on whose behalf he executed the said agreement of November 26th, 1881, release the said party of the first part and his associates and the companies on whose behalf he executed such agreement from all claims down to November 1st, 1884, arising under article VI of said agreement."

Plaintiff's demand is based exclusively on the section hereinabove transcribed, and embraces three separate claims growing therefrom. Its object is to recover the excess of earnings realized by the defendant company from the first of November, 1884, to March 31, 1887, alleged to amount, as shown by defendant's reports made from month to month during that space of time, to the sum of $350,717.78; a similar excess, alleged to amount to $200,000, from March 31, 1887, to January, 1888, during which time defendant made no report, the defendant having ceased and refused to further report or account after March, 1887; and it urges an additional claim of $5,859.47 for an excess of earnings in its favor in the operation of certain lines of railroads in New Mexico and Arizona, thus footing up the claim at the aggregate sum of $556,577.27; and plaintiff's demand finally covers such additional claims growing out of the contract in suit as may be discovered and ascertained on trial.

For defence the following exceptions were pleaded:

1st. That the contract sued upon, being a railway pool between competing railroad companies to divide between them their earnings from competitive traffic, is illegal, for the reason that it is injurious to public interests and contrary to public policy, and hence it cannot be enforced by a court of justice.

2d. That the contract was forbidden by the provisions of the constitution of the State of Texas in force at the time that it was entered into.

244 3d. That if even valid the contract was terminated by the provisions of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," which went into effect on the 3rd of April, 1887, and is generally known as the interstate commerce act.

The judgment below was in favor of the defendant, and plaintiff appeals.

A point which overshadows the discussion of all three of the exceptions is made by plaintiff's counsel, who contends that, the agreement between the parties having been sanctioned by a decree of the courts in which the litigation adjusted between the railroad companies was pending, it has now acquired the force and effect of the thing adjudged, and hence it cannot be attacked collaterally.

As a general proposition of law the contention is unquestionably correct. Civil Code, art. 3078; Adle *v.* Prudhomme, 16 An., 343; Rabun *v.* Pierson, 23 An., 696; Oglesby *v.* Attrill, 105 U. S. Reports.

But from the very nature of the principle as shown by the authorities cited it appears clearly that those matters only which were covered by, and included in the compromise or agreement are affected as things adjudged as a result of the adjustment, even when the same is subsequent- sanctioned or confirmed by the judgment of a competent court.

The rule invoked applies to matters of pre-existing differences which are settled and compromised, and not to agreements or contracts for future action and execution.

Undoubtedly the attempt of either party to the "Gould-Huntington" agreement to avoid collaterally the effect of the adjustment of any contentious matter or of any litigious rights involved in litigation hitherto pending and which has been in terms settled by the compromise would have been defeated by the simple application of the principle now under consideration. But the subject-
245 matter of article 6 of the agreement which is now in suit was not a subject of contention between the parties, either as a difference or in the shape of any pending litigation at the time that the agreement was entered into. In fact it had no existence before, and was only brought into being or life by the contract of November 26, 1881, and it had no reference to the past, but its whole operation or effect was intended exclusively for the future.

This was manifestly the understanding of all the parties at the time. It shaped the action of their counsel who thereafter invoked judicial confirmation of the adjustment, and it was the sole guide of the court when it rendered the decree now set up as *res adjudicata* touching all matters and stipulations contained in the "Gould-Huntington" agreement.

In formulating its decree the court was careful to enumerate in detail all the litigious matters which were in suit between the several railroad companies which had participated in the adjustment and which were parties to litigation then pending before the court, and it requires no argument to show that no other matters or stipulations in the agreement were in any way or degree affected by the judgment then rendered.

To clear away any doubt which might thereafter exist or — *un*suggested as to the precise meaning, bearing, intent, and effect of the judgment rendered, the court made the following explanation of its own decree as part of said decree:

"The aforesaid decree is made to carry out the provision *in this behalf* of said agreement, dated November 26, 1881, which is hereby made a part of this decree, and by consent of the parties and upon consideration by the court is hereby ordered and decreed to be binding upon each and all the parties hereto in all its stipulations and agreements as therein shown, and said decree does not *otherwise affect or interfere with the provisions of said agreement.*" (Italics are ours.)

246 Hence we conclude and we hold that the stipulations of article 6 of the "Gould-Huntington agreement" have not the force and effect of the thing adjudged, and that they are lawfully liable to attack in the mode and manner herein adopted by the defendant corporation.

This conclusion is of course mainly predicated on the theory, fairly deducible from the record itself, that the agreement in its entirety does not evidence a single and connected contract, depending on all its parts and stipulations for a proper execution as an effect flowing from the unity of the contract, but that the instrument in its shape was used as a means to facilitate the execution by two representatives of numerous obligors and distinct obligees of a series of varied and distinct contracts.

As controlling and representing the varied interests of a cluster of railroad companies, Huntington acted in behalf of the following corporations: "The Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of New Mexico, and the Southern Pacific Railroad Company of Arizona, the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, and the Louisiana Western Railroad Company." And Gould, clothed with corresponding authority from his system of roads, stipulated in behalf and in the name of the following companies: "The Texas and Pacific Railway Company, the International and Great Northern Railroad Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railroad Company."

In this connection the record shows to our entire satisfaction that the parties themselves did not understand that the instrument was intended to evidence a single connected contract, as appears from the following stipulation:

"The foregoing agreement shall be submitted by the respective parties thereto to the several boards of directors which they
247 respectively represent, and the same shall be accepted, adopted, ratified, confirmed, made, and declared by said several boards of directors to be the act and contract of their respective corporations so far as the same affects them respectively."

And the same understanding appears in yet bolder relief from the language used in the following clause:

"It is understood that either or any of the said several railroad companies, parties to this agreement, may maintain any action, either at law or in equity, against either, any, or all of the other companies, parties to this agreement, to protect any right secured by this agreement, to specifically enforce the same, or to recover damages for the breach of any stipulation in this agreement affecting its interests, and that no objection shall be had or taken to any such action by reason of the non-joinder of the parties as plaintiffs, and all clauses in this agreement contained are to be so construed as to secure this right."

The parties have thus construed their own contract and have themselves qualified their agreement in a manner which completely refutes the argument of plaintiff's counsel in the present case.

It is true that by the act of incorporation in 1884, which created the defendant company in its present autonomy, all the corporations which were there represented by Huntington, with the exception of the Southern Pacific Railroad Company of California, of Arizona, and of New Mexico, have been fused into and were made parts of the same system known as the "Southern Pacific Company;" but this does not alter the nature and legal effect of the original contract as executed and understood by the original parties to the agreement.

That it was so understood is made manifest by a clause inserted in the amendment of the agreement under date of February 16, 1885, which stipulates, as was done in the original contract, that the modifications then made were to be submitted for adoption 248 and ratification to the respective boards of directors of the companies represented respectively by Huntington and by Gould.

We feel, therefore, fully warranted to treat and discuss article 6 now in suit as a complete and independent contract, with a sole consideration, which was the mutual advantage to be derived therefrom by the companies to be affected thereby. The clause or contract, as shaped, has reference to no other portion of the agreement, which is complete for the purposes originally contemplated without the contract contained in that clause, as complete as the contract formulated in the section stands without any reference to any or all of the other provisions of the agreement. In discussing that article we have, therefore, no concern with any of the concessions made mutually by the parties to the agreement as considerations for other matters specified or other advantages jilted or obtained by the parties respectively in other portions of the agreement.

We shall now discuss the real nature and legal effect of the contract evidenced by article 6 of the "Gould-Huntington" agreement.

It appears from the record, including evidence taken on the trial of the exceptions, that the systems of railroad companies made parties, respectively, to the proposed agreement had each a through and complete line of communication absolutely independent of each other, except as hereafter stated, from El Paso to Galveston and from El Paso to New Orleans, the points of traffic for which the earnings of the contracting parties were to be divided. From El Paso to New Orleans the Texas and Pacific, plaintiff herein, had a continuous line of communication of itself, and from El Paso to Galveston its means of communication were by its own line from El Paso to Mineola, and thence by the International and Great Northern Railroad Company, connecting with the Galveston, Houston and Henderson Railway Company, two of the companies controlled and represented by Jay Gould.

The communication of the Southern Pacific, defendant
249 herein, between El Paso and Galveston was by means of the Galveston, Harrisburg and San Antonio Railway Company and the Galveston, Houston and Henderson Railroad Company and its means of communication between El Paso and New Orleans were through the lines of the Galveston, Harrisburg and San Antonio, the Texas and New Orleans, the Louisiana Western, and the Morgan's Louisiana and Texas Railway Companies, all then controlled by Huntington and now parts of the Southern Pacific system. The only parcels or portions of the through lines between either of the three points of traffic used in common by the two systems are a line of 90 miles east of El Paso and a short line between Galveston and Houston, and the rights of the parties to the use of these two lines were secured in the agreement of November, 1881, in two separate and distinct stipulations outside and entirely and safely independent of article 6, now under discussion. There is no contention here as to the free exercise of that right.

Now, as at certain points, both in Texas and in Louisiana, it appears that the respective lines of the plaintiff's and of the defendant's systems of roads are very far apart, there is no pretension that they are parallel roads, but from the record, as shown by the foregoing statement, it appears very clearly that for the traffic between El Paso and New Orleans and between El Paso and Galveston they were unquestionably competing lines.

It cannot be doubted that shippers who desired, without the existence of the agreement contained in article 6, to consign goods either from El Paso to New Orleans or the reverse had the option to select either of the two lines in accordance with the most favorable terms which he could obtain from either. He would then have had the advantage of the natural competition existing between the two rival systems; but under the effect of the arrangement now under discussion the shipper could derive no advantage as a result of his choice between the two, as the terms would be the same with
250 either or both. It is therefore too clear for further argument or illustration that the first, the lasting, and inevitable result of the agreement to the public was to stifle competition; and as competition is the life of trade the effect of the contract must necessarily and inevitably have been injurious to public interests, and hence it was contrary to public policy.

We have been at great pains and have devoted long and tedious labor to examine all the authorities, consisting mainly of decisions rendered on this point by courts of last resort in this country, which were submitted to us by counsel in this case, and we reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities or in the carriage or transportation of such commodities, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce.

A reference to some — the leading and most pointed authorities on the subject may not be out of place in this opinion, notwithstanding its formidable length.

In the case of Hooker *v.* Vandewater, 4 Denio, p. 349, the court had to consider a contract between the proprietors of several lines of canal-boats, who had agreed to establish fixed rates of freight and passage for a certain season, and to divide the net earnings among themselves according to fixed rules. The attempt of one of the contracting parties to enforce the agreement against a recalcitrant member of the combination was discountenanced. True, the contracts fell under the ban of a special statute of the State, but the court nevertheless took occasion to sanction the general principle which underlies our conclusions in this case. The court said:

"It is a general proposition that an agreement to do an unlawful
act cannot be supported at law, that no right of action can
251 spring out of an illegal contract; and this rule applies not
only when the contract is expressly illegal, but whenever it is
opposed to public policy or founded on an immoral consideration, the maxim being *extempo causa non anritur actio*."

In the case of Stanton *v.* Allen, 5 Denio, p. 434, the court refused its aid to enforce the payment of a promissory note growing out of transactions predicated on a similar contract on the ground that such a contract cannot receive judicial sanction. We cull the following language from that opinion: "Though the branch of the law relating to public policy is liable to be misunderstood and extended beyond its proper dimensions, still it must not on that account be neglected or disparaged. The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the great preservative principles of a State." And referring to the case herein previously quoted the court said: "That decision being conclusive on the main point in the present case, I might have rested upon that authority alone if I had not supposed that the occasion called for an opinion as to the legality of such an association upon the principles of the common law."

In Ohio an association of salt manufacturers entered into a combination for the purpose of selling and transporting that commodity. The court refused its aid to enforce its conditions, saying, among other things, "the clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Salt Co. *vs.* Guthrie, 35 Ohio, 666.

252 The doctrine finds additional support and sanction from the following authorities:

Gibbs *v.* Baltimore, 130 U. S., p. 408, in which the court took occasion to set down a rule peculiarly applicable to pooling arrangements between competing railroad companies, which are universally recognized and treated in jurisprudence as quasi-public corporations. The learned chief justice, as the organ of the court, said with great clearness and terseness:

"Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contracts * * *, yet in the instance of business of such character that it presumably cannot be restricted to any extent whatever without prejudice to the public interest courts decline to enforce or sustain contracts imposing such restraint, however impartial, because in contravention of public policy." See also Woodstock Co. *v.* Extension Co., 129 U. S., 644; Morris *v.* Barclay, 68 Pa. State, 173; Arriot & *al.* *v.* Canal Co., 68 N. Y., 558; Craft *v.* McConoughty, 79 Ill., 346 (22 An. Reports, 71); Morrill *v.* R. R. Co., 55 N. H., 537; Jackson *v.* McLean, 36 Federal Reporter, 213; Santa Clavan *vs.* Hayes & *al.*, 18 Pacific Reporter, 392; Hamilton's note, 15 Federal Reporter, p. 667.

We are referred by plaintiff's counsel to several authorities which are quoted as antagonizing the views which we have adopted in this opinion.

But we have not found any decisions emanating from American courts of last resort which have enforced or recognized any rights flowing from a contract which had a tendency to stifle competition in trade or in the business of common carriers, or which were for other or similar reasons contrary to public policy. The adjudications which have sustained contracts assailed on similar grounds are predicated on facts which removed each particular case from
253 the operation of the rule, for the simple reason that "cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered." 20 Wall, 64–'8.

Under our own system the doctrine is not only sanction by judicial authority, but it has been specially incorporated in our code, in its wide range of remedies for wrongs and enforcement of rights.

Article 1893 reads: "An obligation without a cause or with a false or unlawful cause can have no effect."

Article 1895 provides: "The cause is unlawful when it is forbidden by law—when it is *contra bones mores* (contrary to moral conduct) or to public order."

In case of Firemen's Association *vs.* Berghans, 13 An., 209, the principle was formulated thus: "When a contract belongs to a class which is reprobated by public policy it will be declared void, although in that particular instance no injury to the public may have resulted."

The case of the India Bagging Co. *v.* Kock, 14 An., 168, involved an attempt to judicially enforce one of the conditions of an association formed by dealers in bagging, who had agreed not to sell any bagging for the term of three months, without the consent of the majority of the members, under a stipulated penalty. In dismissing the action the court used the following language:

"This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocally a combination in restraint of trade and to enhance the price in the market of an article of prime necessity to cotton planters. Such combinations are contrary to public order and cannot be enforced in courts of justice."

See also Glasscock *v.* Wells, 23 An., 517*a;* Cummings *v.* Saux, 30 An., 207.

Our ruling on this point is fortified in a double panoply,
254 furnished by civil as well as common law authorities.

Plaintiff's counsel, however, make the point that were they to concede, for the sake of argument, that the contract sued on might be against public policy, yet, in so far as it has been executed, plaintiffs are entitled to recover.

The argument is predicated mainly on the fact that from month to month between November, 1884, and March, 1887, the defendant had executed its obligation under the contract by submitting reports of its earnings, by which it appeared that it was indebted to plaintiff in the sum of $350,717.78, and that by pleading a peremptory exception the defendant admitted an additional indebtedness on the same basis of $200,000.

A proper understanding of the considerations which underlie our conclusions herein previously announced affords a ready answer to this contention.

The rule is that no effect can be given to a contract reprobated by law or contrary to public policy, and hence courts cannot lend their aid even to secure an otherwise fair division of the results of an illegal contract between the parties thereto.

In cases like the present, in refusing to enforce the stipulations of a contract which has the palpable tendency to stifle competition or to create or foster a monopoly, courts will not go to the extent of discussing the nullity of the contract sued on, but they simply abstain from dealing with it or from discussing any of its effects as between the parties. On ascertaining that the building is infested with the disease of illegality the judge simply refuses to enter its portals and he retires without incurring contact with any of its inmates and without attempting to examine into or to rectify any rights or wrongs which may exist between the inmates of the polluted household. He leaves them quietly where they have placed themselves, and he turns a deaf ear to any equities which one of the parties may
255 invoke against the other.

It is on this principle that by far the greater number of the decisions hereinabove quoted were grounded.

In the case of Gibbs *v.* Baltimore Gas Co., 130th U. S., p. 396, the court refused its aid to a party who claimed a stipulated commission for having negotiated a favorable contract for the gas company on the ground that the contract was illegal. The court expounded the general principles as follows: "The rule of law is of universal operation that none shall, by the aid of a court of justice, obtain the fruits of an unlawful contract."

There is no conflict between the law of that case and the legal conclusions announced in the case of Brooks *v.* Martin, 2 Wallace,

p. 70, on which plaintiffs' counsel mainly ground their hopes of success on this point.

Brooks and Martin had formed a partnership for speculation in soldiers' land warrants, which had been forbidden by an act of Congress. Brooks, who had the exclusive management of the firm's business, acting as the agent of his copartner, subsequently bought out the latter's interest in the concern. To a suit brought by Martin to avoid the sale on the ground of fraud on the part of Brooks the illegality of the original dealings of the firm was pleaded, but the court held that the illegality of the original contract was not a bar to Martin's recovery, as his claim did not involve the nature of said contract. The following clear distinction between a cause of action on the original contract and that on the rescission of a sale tainted with fraud is a fair answer to plaintiff's reliance on that case:

" We have no doubt that the traffic was illegal. Undoubtedly the main object of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. * * * If a soldier who had
256 thus sold his claim to Brooks, Field & Co. had refused to
perform his contract or to do any act which was necessary to give them the full benefit of their purchase no court would have compelled him to do it or given them any relief against him, and if they had by any such means got possession of the land warrant or scrip of a soldier no court would have refused in a proper suit to compel them to deliver up such land warrant or scrip to the soldier; or if Brooks, after signing these articles of partnership, had said to Martin, 'I refuse to proceed with this partnership because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such refusal."

This is precisely the legal attitude occupied by the parties in this controversy.

If an illegal contract, the defendant herein had agreed and covenanted to pay over to plaintiff any pool balance to which the latter was entitled under the arrangement to divide their joint earnings in the traffic between El Paso and Galveston and that between New Orleans and El Paso, it has acknowledged the existence of such a balance, but when called on to deliver the same it refuses and sets up the illegality of the contract under which it was obtained, the answer of the court must be that plaintiff, urging a claim based exclusively on an illegal contract, is without remedy.

Having concluded that the contract sued on was illegal, as contrary to public policy, we see no necessity to discuss the two other grounds of exception set up by the defendant.

Judgment affirmed.

257 (Copy.)

Suggestion and Order. Filed November 21st, 1889.

TEXAS AND PACIFIC R. R. CO.
vs. No. 10337.
SOUTHERN PACIFIC R. R. CO.

On motion of Howe and Prentiss, attorneys for plaintiffs, and suggesting that John C. Brown, who was at one time receiver of the property of the plaintiff railway company, and whose name appears in the petition herein as such receiver only, was discharged as such receiver by the said court which appointed him pending this suit, and has since departed this life on the 15th of August, 1889, and that said John C. Brown, said receiver, had no personal interest in the cause which was and is the suit and claim of the plaintiff corporation alone—

It is ordered that this cause do proceed in the name of the said Texas and Pacific Railway Company as sole plaintiff.

STATE OF LOUISIANA,
Parish of Orleans.

Edward B. Wheelock, of New Orleans, being duly sworn, says that he is general agent of the Texas and Pacific Railway Company, and that the matters of fact suggested in the foregoing motion are therein truly and correctly stated.

(Signed) E. B. WHEELOCK.

[SEAL.] Sworn to and subscribed before me this 20th day of November, A. D. 1889.

(Signed) J. G. EUSTIS, *Not. Pub.*

258 *Suggestion and Order.*

Extracts from the Minutes of November 21st, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

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SOUTHERN PACIFIC R. R. CO.

On motion of Howe and Prentiss, of counsel for plaintiffs, and suggesting that John C. Brown, who was at one time receiver of the property of the plaintiff railway Co. and whose name appears in the petition herein as such receiver only, was discharged as such receiver by the said court which appointed him pending this suit, and has since departed this life, on the 15th of August, 1889, and that said John C. Brown, said receiver, had no personal interest in the cause which was and is the suit and claim of the plaintiff corporation alone—

It is ordered that this cause do proceed in the name of the said Texas and Pacific R. R. Co. as plaintiff.

259 *Petition for Rehearing. Filed Nov. 25th, 1890.*

Supreme Court of Louisiana.

THE TEXAS AND PACIFIC RAILWAY COMPANY
versus No. 10337.
THE SOUTHERN PACIFIC COMPANY.

Petition for rehearing.

To the honorable the chief justice and associate justices of the supreme court of Louisiana:

The petition of the Texas and Pacific Railway Company, the plaintiffs herein, respectfully shows:

That there is error to their prejudice in the opinion and decree of the court rendered herein on the 18th November instant, and they ask for a rehearing of the cause according to law.

And they show—

First. The court erred in its opinion and decree in deciding that the agreement sued on was not made the decree of the said courts of New Mexico, Arizona, and Texas, as averred in the petition and admitted by the exceptions of defendant.

The petition avers—

"That in pursuance of said agreement the same was duly made a decree of the court in the said litigation hereinbefore referred to and in said courts of Texas, New Mexico, and Arizona, as by duly certified copies of said decrees will appear and in the form 260 shown by the copy hereto annexed as part hereof and marked Exhibit 'C,' which decrees conformed with and carried out said agreement."

And the exception admits the truth of this averment.

The form of the decree in the court of the Territory of New Mexico shows that a copy of the agreement was attached to said decree; that the agreement had been duly ratified and confirmed by all the parties, and in consideration thereof, as well as the other premises recited, the decree was made. The decree also declares as follows:

"The aforesaid decree is made to carry out the provisions in this behalf of said agreement, dated November 26th, 1881, which is hereby made a part of this decree, and by consent of the parties and upon consideration by the court is hereby ordered and decreed to be binding upon each and all of the parties hereto in all its stipulations and agreements as therein shown, and said decree does not otherwise affect or interfere with the provisions of said agreement."

This decree, as well as the similar one in the district court of the Territory of Arizona, and also in the Texas court, sustains our claims thereunder, which your honors have denied. It makes the whole Gould-Huntington agreement part and parcel of the decree; the whole, and not a part. It declares in the part lastly quoted that the said agreement of November 26th, 1881, is hereby ordered and decreed to be binding upon each and all of the parties hereto in all its stipulations and agreements as therein shown. All the parties of the first part are admitted to be represented and run by the defendant in this case; and among all the stipulations and agreements as therein shown is the division of certain earnings sued upon in this case. A plainer case of transaction or compromise embodied in decrees of court and having the effect of *res judicata* has never been seen. The district courts of New Mexico and Arizona are established under the Constitution of the United States by the Congress thereof. The litigation arose under the Constitution and laws of the United States, and especially 261 under the acts of Congress with reference to the Texas and Pacific Railway Company, recited in the petition in this cause. The said territorial courts had jurisdiction under the acts of Congress. Rev. Stat. of the United States, sections 1839 to 1895 and section 1910; Constitution of the U. S., Art. IV, section 3, par. 2.

And the similar decree of the Texas court is entitled to full faith and credit in this cause under the same article, section 1, and we have claimed our rights under the Constitution and laws of the United States and again claim them.

It is not correct, we submit, to assert that these decrees do not have the effect we claim for them, because they each say that "the said decree does not otherwise affect or interfere with the provisions of said agreement."

Manifestly the litigation was settled or compromised by the agreement, and the decrees recognize and sanction the agreement as a whole, and show, among other things, that the quarrel as to a great right of way was settled and a great land grant and valuable franchises conveyed. The obligations as to those are complied with, but this compliance and its decreed consequences are not to otherwise affect or interfere with the provisions of the said agreement—that is, they are not to be prejudiced or declared as yet complied with. They are to stand recognized and confirmed by the decree, which recognized and confirmed the whole agreement.

It is admitted by your honors, in our opinion, that the conclusion you have arrived at can only be reached by separating the "Gould-Huntington agreement" into a number of independent contracts. We submit that such separation is erroneous, and we point to the alarming injustice that must result from this error. We are to give everything and receive nothing. A court will be astute to avoid such a conclusion; but no astuteness, we submit, is necessary to avoid such a result.

262 The agreement speaks for itself in no uncertain way. The preamble contains the following recitals, which apply to the whole agreement as fully as the preamble of the Constitution applies to the whole instrument:

"Witnesseth: That whereas the said Huntington and his associates own and control a majority interest in the said companies for whose behalf he acts as aforesaid;

"And whereas the said Gould and his associates own and control a majority interest in the companies for whose behalf he acts as aforesaid;

"And whereas divers differences have arisen and exist between the three Southern Pacific Railroad Companies above named and the said Galveston, Harrisburg and San Antonio Railway Company, on the one hand, and the Texas and Pacific Railway Company, on the other;

"And whereas in respect to some of the said differences various suits are now pending in the courts of Arizona, New Mexico, and Texas, threatening long-continued, troublesome, and expensive litigation;

"And whereas the continuance of such litigation is injurious to all of said companies and incidentally to the public interests, so far as the business of said lines is concerned;

"And whereas said differences and litigation have been found, upon conference and deliberation, to be susceptible of amicable adjustment, as in this contract provided;

"And whereas the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company own and control lines of railroad connecting with the road of the Texas and Pacific Railway Company, and are interested in the subject-matter of this agreement, except so far as pertains to the direct controversies in the pending suits between the said Southern Pacific Railroad Companies and the Galveston, Harrisburg and San Antonio Railway Company on the one side and the Texas and Pacific Railway Company on the other:

"Now, therefore, the parties hereto, with a view permanently to settle all controversies between said companies of the first part or any one or more of them and the companies of the second part or any one or more of them, and to prevent further controversies, and in consideration of the premises and of the mutual covenants hereinafter contained, the parties hereto do covenant, promise, and agree each with the other as follows:"

263 Then come the different parts of the agreement. They are numbered, for the sake of convenience, as the different parts of the body are catalogued by the anatomist, but they form one agreement, even as such a body is one.

It is in vain to reply that the agreement was to be ratified by the different companies. That was necessary as a matter of proper business precaution, but what was to be ratified? A congeries of different agreements? No. "The foregoing agreement," as a unit, whose unitary consideration is not to be divided up and frittered away as to us and left to be enjoyed by the other side in full.

Nor does the clause in regard to suits sustain the conclusion of your honors. It points to the reverse. If the document was a congeries of different agreements the clause might have been omitted. Its presence indicates a perfect consensus of opinion at that time by the parties that the agreement was a unit, and that therefore this right of individual action should be conferred. Permit us to repeat what we have already said in a former brief:

"The unity of the contract and the unity of the consideration.

"This is apparent from the fact that it is an agreement between Mr. Gould upon one side and Mr. Huntington upon the other—Mr. Huntington as controlling the majority of the stock of the companies for which he acted and Mr. Gould as controlling the majority of the stock of the companies for which he acted. So that really it was Mr. Gould on one side and Mr. Huntington upon the other in respect to the properties controlled by them respectively. There were differences between the Pacific Railroad Companies and the Galveston, Harrisburg and San Antonio Railroad Company on the one side and the Texas and Pacific Company on the other. Some of these differences had brought on litigation then pending in the courts of Arizona, New Mexico, and Texas. The object of this agreement was to settle all these differences and all litigation between Mr. Gould and Mr. Huntington or the corporations controlled by them. That agreement was entered into, as it appears on its face, with a view permanently to settle all these differences and all litigation between Gould and Huntington, to settle all controversies between the companies or any one of them on the one side and the companies or any one of them on the other side, and to prevent all
future controversies between any and all of them. It was an
264 agreement entered into of an enduring character, because in
the 15th article it is provided 'that the agreements and each of them herein are of perpetual obligation.' One of the objects of the agreement was to prevent the unnecessary expenditure of capital in building a railroad, for the benefit of one side, from Houston to Galveston or, for the benefit of the other, from the junction to El Paso. To avoid that expense the agreement provided for the joint use of the track from Houston to Galveston and for the joint use of the track from the junction to El Paso, the track of the latter belonging to the Galveston, Harrisburg and San Antonio Company and the track of the former belonging to the Galveston, Houston and Henderson Railroad Company. The agreement further provides for the transfer by the Texas and Pacific Company to the Southern Pacific Companies, represented by Huntington, of the immense land grants which had been given by the United States to the Texas and Pacific Company. The Texas and Pacific Company also transferred all of its franchises west of El Paso to the Southern Pacific Companies, represented by Huntington. It was in consideration of all these agreements and conveyances on the part of Mr. Gould and the companies represented by him that Mr. Huntington and the companies represented by him agreed that the Texas and Pacific and the Southern Pacific Companies should be operated as one through continuous line to the Pacific Ocean, the earnings to be divided in proportion to the distance hauled by each party; that the arrangement for division of earnings provided for in article 6 was made; that the Louisiana Western Company was to use the Texas and Pacific track into New Orleans; that the parties agreed

not to build competitive roads or to duplicate the roads of each other, and that they also agreed not to purchase or control competing roads, and the clause in the 15th article was inserted for the express purpose of avoiding the difficulty which would have arisen from the terms of the agreement but for that provision contained in that article.

"The contract as it stood was a joint contract between all the parties, and no suit could have been brought upon the contract by any one company but for the provision contained in article 15, which allowed one of the parties to maintain actions against any other or against any or all of the railroad companies to protect any right secured by the agreement. But for that clause no such separate suit could have been brought.

"It is, therefore, manifest that the agreement is one; that there are a great variety of considerations enuring to the different companies, but they all constitute a part of one contract between Mr. Gould upon the one side and Mr. Huntington upon the other.

"The unity of the contract being conceded, we have an 265 averment in the petition, on page 5, that 'in pursuance of said agreement the same was duly made a decree of the court in said litigation hereinbefore referred to and in said courts of Texas, New Mexico, and Arizona, as by duly certified copies of said decrees will appear and in form shown by the copy hereto annexed as part hereof and marked Exhibit "C," which decrees conformed with and carried out said agreement.' Therefore the agreement has become *res adjudicata*, not only because it is by law in itself as a transaction *res adjudicata*, but because that transaction has been reduced to a judgment of court, and that judgment cannot be impeached by either party collaterally. Therefore, even if the alleged illegality in the sixth clause of the agreement existed, the defendant is precluded by this judgment from availing himself of it. It is too late now for him to set up as a defense to the execution of the agreement a matter which should have been set up or could have been set up in the suit in which judgment on the agreement was rendered. It is well settled that a transaction or a judgment cannot be attacked collaterally, as was decided by the Supreme Court of the United States in the case of Attrill *vs.* Oglesby, 105 U. S., 605; also in 16 An., 343; 11 An., 754, and Rabun *vs.* Pearson, 23 An., 696."

The fact that the sixth section of the agreement is entitled a "mutual agreement" has no force against our view. The considerations recited in the preamble consolidate into one unitary consideration the various matters recited, including the "mutual agreements" of the parties, and provide for one agreement on this basis.

Second. It is submitted that the court has erred in holding the agreement sued on to be illegal, null, and void as contrary to public policy.

(1.) In the first place, it appears on the face of the petition and the agreement itself that the act of Congress of March 3d, 1871, chapter 122, which incorporated the plaintiffs, authorized them by § 5 to make "running arrangements" with any railroad company existing or to be created.

And the act of Congress of June 22d, 1874, ratified the merger in the plaintiffs' company of the Transcontinental Railway Company,
by § 3 of whose charter the right was given to acquire
266 such roads and franchises as might be necessary to reach the
Atlantic; and by the decision in the "removal cases" all cases of this kind raise the Federal questions. 115 U. S., p. 2.

We claim the right under these Federal statutes to make the agreement sued on. Your honors have denied that right, and upon this point alone we may properly ask for a rehearing.

(2.) And, furthermore, it appears on the face of the petition, the exceptions, the agreement, and the testimony that the questions in this cause concern mainly interstate commerce between the Pacific and the Atlantic or between Louisiana, Texas, and California. This is matter for the Congress of the United States to regulate under article 1, section 8, par. 3, of the Constitution of the United States, under which we claim the rights thereby accorded. The Congress did not forbid the agreement sued upon, and any attempt to apply State laws to annul such agreement is unlawful. Hall *vs.* Decuir, 95 U. S., 485.

(3.) The exception which alleges the general illegality of the agreement does not aver any fact to maintain such a charge. As we have heretofore stated, it does not allege any fact which goes to show that the agreement operates a restraint of trade, or a restraint of competition, or a fixing of prices or rates, or raising of rates, or any other injury to the public, and much less are any of these things proved.

Your honors seem to have overlooked this point entirely. The cases you cite from New York and Ohio and from other States are where rates or prices were fixed. The general doctrine of restraint of trade has been, as we have shown, greatly modified. Kellogg *vs.* Larken, 3 Chandler (Wis.), 133; Diamond Match Co. *vs.* Roeber, 106 N. Y., 473; Oregon Co. *vs.* Winsor, 20 Wall., 64.

The effect of the agreement sued upon is not to stifle competition. It fixes no rates; it imposes no penalty; it appoints no governing body; it exercises no control by the parties on the one side over those on the other side.

If an agent of the Texas and Pacific Company in New
267 Orleans wishes to get the business of a large mercantile firm
here he can charge a lower rate to El Paso or San Francisco in order to induce such firm to give to the Texas and Pacific their other business to Dallas, Fort Worth, or Marshall. The argument of defendant that under this agreement to divide earnings only on certain traffics both parties would become careless as to getting business would seem to be absurd. The court will take notice that there is much other business besides that included in the agreement, and there are other transcontinental lines. If both parties should neglect to get business neither would get anything to divide.

The agreement evidently was intended to prevent the unnecessary expenditure of capital in the construction of duplicate roads from the junction to El Paso and from Houston to Galveston; and in Woodstock Co. *vs.* Extension Co., 129 U. S., p. 644, it is decided to be the duty of railway companies not to build unnecessary lines, which impose a needless charge on the public in tolls and charges.

The quotations from the code of Louisiana as to obligations without a cause or with a false or illegal cause are not in point. To apply them the illegality must be first assumed when it does not exist.

No court, either in this country or in Europe, has yet decided that such an agreement as that sued on is illegal upon the ground of public policy. On the contrary, the courts in England have sustained the validity of such an agreement or of an agreement infinitely more objectionable than the one sued on.

Mr. Hadley, in his valuable work on railroad transportation, shows that even pools which fixed rates and might be considered much more objectionable than the agreement sued upon are not only held not unlawful in England, but are considered legal in Belgium, where the code Napoleon prevails and where they have
been made between roads belonging to the State and those
268 belonging to private corporations. See Hadley on Railroad
Transportation, pages 81 and 216.

It seems from his statements at page 81 that the government of the German Empire also recognizes real pools as legal where the civil law is the basis of jurisprudence.

We cannot control the court in the manner in which it shall examine a case, but we have a right to ask for a rehearing on this ground alone, that many important decisions which we cited and discussed have not been noticed in the opinion.

The modern English and American cases were admirably summed up in the extract we cited from Morawetz. If what he said be true in regard to those agreements, which clearly show upon their face a restraint of competition, still more is it true in regard to the agreement sued upon in this case, which fixes no rates, which defines no penalty, which appoints no board of control, which exercises no control by one party over the other, which is alleged in the exception of the defendant to have been made in good faith, which is not alleged as a matter of fact to have restricted competition, and which does not as a matter of fact restrict competition. The first exception, we repeat, avers no fact to show that the agreement sued on stifles competition. If it had we could have tried the issue. We assert that if the case can be heard on the merits we can show that it has not had this effect, but the contrary.

the Boston case

Third. It is further submitted that the court has erred in its ruling on the question of the execution of the agreement and the effect thereof.

The effect of your honors' decision on this point is so remarkable that it should certainly be avoided if possible. That the parties on the one side of the agreement should have everything and those on the other side nothing is a consummation devoutly to be deprecated.

We desire, therefore, again to call the attention of the court to the
fact that it is conceded that the agreement in suit has been
269 very largely executed; that vast considerations, moving from

us to the defendant, have been received and are being retained and enjoyed by the latter.

It is admitted that the defendant has accounted month by month and year after year, under the agreement sued upon, down to March 31st, 1887, and the amount we claim is admitted to be due and exigible in the plain business sense of those words.

In the case of Nashua Railroad *vs.* The Boston Railroad, 19 Federal Reporter, p. 804, it was held by the United States circuit court in Massachusetts that, a pooling contract being once executed, one corporation is estopped in denying the validity of its own act in making it in defense to an action for an infraction brought by the other. The court did not seem to think that the contract was illegal at all, but declared that, inasmuch as it had been executed and the defendant road had availed itself of its benefits, that corporation was estopped to deny its validity. In a leading case of the Central Trust Company *vs.* Ohio Railroad Company, 23 Federal Reporter, p. 306, to which we have already alluded, where it appeared that a balance had accumulated under a pooling contract by which rates had been fixed on coal, the court said that the contract had been executed as to the transactions and business out of which the balance had grown, and, whether the contract was legal or not, that balance must be paid over.

We think these decisions are good law and good morals, and we beg to question the theory that good morals are promoted by sustaining the exceptions of defendant, and we ask for a rehearing on this point also.

Fourth. The questions of the effect of the Texas constitution and of the interstate commerce law do not seem to have been passed on by the court. Upon these questions we submit again the views contained in our brief heretofore printed.

Premises considered, plaintiffs respectfully ask for a rehearing and for general relief.

Nov. 23d, 1889.

HOWE & PRENTISS,
Attorneys for Plaintiffs.

270 *Rehearing Refused.*

Extract from the Minutes of December 31st, 1889.

The court was duly opened pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poche, Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, associate justices.

TEXAS AND PACIFIC R. R. Co.
vs. } 10337.
SOUTHERN PACIFIC R. R. Co.

By the court.
Rehearing refused.

(Copy.)

Petition for Writ of Error. Filed January 9th, 1890.

Texas and Pacific Railway Company
vs.
Southern Pacific Railway Company. } No. 10337.

To the Hon. Edward Bermudez, chief justice of the supreme court of Louisiana:

The petition of The Texas and Pacific Railway Company, the plaintiffs in the above-entitled cause, respectfully represents—

That on the 31st December, 1889, the decree of the supreme court of Louisiana in this cause against your petitioners, plaintiffs therein, became final, and was and is the final decree and judgment
271 of the highest court of law and equity in Louisiana in which a decision could be had in said suit.

That in the record and proceedings and in the rendition of said final decree or judgment there was drawn in question the validity of statutes of or of authority exercised under the United States, and said decision was against their validity, and there was drawn in question the validity of a statute of or an authority exercised under said State of Louisiana on the ground of their being repugnant to the Constitution or laws of the United States, and said final decision was in favor of such their validity, and there was — in question the construction of clauses of the Constitution and statutes of the United States, and said final decision was against the title, right, privilege, and exemption specially set up and claimed under such clauses of said Constitution and statutes.

That, as petitioners are advised and believe, there is error in said final judgment against them and they have a right and desire to have the cause venired by writ of error to the Supreme Court of the United States.

Wherefore they pray that a writ of error be allowed herein, to operate as a supersedeas, and a bond for that purpose approved and *utatem seques* according to law, and for general relief.

(Signed) HOWE and PRENTISS,
Att'ys for Petitioners.

As there was no Federal — drawn in — which was passed upon adversely to the applicant, the writ is not allowed.

New Orleans, January 10th, 1890.

(Signed) E. BERMUDEZ,
Chief Justice Supreme Court La.

272 (Copy.)

Order Refusing Writ.

As there was no Federal — drawn in — which was passed upon *the* adversely, the writ is not allowed.

New Orleans, January 10th, 1890.

(Signed) E. BERMUDEZ,
Chief Justice Supreme Court La.

Copy of Writ Lodged in Clerk's Office.

UNITED STATES OF AMERICA:

The President of the United States of America to the honorable judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, and also the rendition of the judgment of a plea which is in said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between "The Texas and Pacific Railway Company, plaintiff, and The
273 Southern Pacific Company, the defendant, wherein was drawn in question the validity of a treaty or a statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority execised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exception specially set up or claimed under such clause of said Constitution treaty statute or commission, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the "twentieth" day of January, in the year of our Lord one thousand eight hundred and ninety.

274 (Signed) JAS. H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
L. Q. C. LAMAR,
Associate Justice Supreme Court U. S.

NEW ORLEANS, *January 28th*, 1890.

The plaintiff in error has this day lodged in my office a copy of the within writ of error for The Southern Pacific Company, the defendant in error.

(Signed) JOSEPH F. POCHÉ,
Clerk Supreme Court La.

275 Copy.

Bond for Writ of Error. Filed January 28th, 1890.

Know all men by these presents that we, The Texas and Pacific Railway Company, as principal, and Edward B. Wheelock, as surety, are held and firmly bound unto the Southern Pacific Company in the full and just sum of one thousand dollars, to be paid to the said Southern Pacific Company, its certain attorney, executors, administrators, successors, or assigns; to which payment, well and truly — be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of January, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at the present term of the supreme court of Louisiana, holding sessions in New Orleans, Louisiana, in a suit pending in said court wherein The Texas and Pacific Railway Company are plaintiffs and The Southern Pacific Company are defendants, judgment was rendered against plaintiffs, and the said plaintiffs, The Texas and Pacific Railway Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said supreme court of Louisiana to reverse the judgment in the aforesaid suit, and a citation directed to the said Southern Pacific Company, citing and admonishing the Southern Pacific Company to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

276 Now, the condition of the above obligation is such that if the said Texas and Pacific Railway Company shall prosecute their writ to effect and answer all damages & costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC RAILWAY CO.,
By E. B. WHEELOCK, *Gen'l Agent.*
(Signed) E. B. WHEELOCK.

Sealed and delivered in the presence of—
(Signed) W. W. HOWE.
M. BURTON.

Approved by—
L. Q. C. LAMAR,
Associate Justice Supreme Court U. S.

Clerk's Certificate.

UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

I, Joseph F. Poche, clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans, certify that the foregoing 276 pages contain a full, true, and complete copy of the transcript of the proceedings had in the civil district court for the parish of Orleans in a certain suit wherein The Texas and Pacific Railway Company was plaintiff and The Southern Pacific Railway Company was defendant, and also of all the proceedings had in this honorable court on the appeal taken by said plaintiff, and which appeal is now on file in this court under No. 10337.

277 In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 17th day of February, anno Domini 1890, and in the hundred and fourteenth year of the Independence of the U. S. of America.

Seal Supreme Court of the State of Louisiana.

JOSEPH F. POCHÉ, *Clerk.*

Certificate of the Chief Justice.

UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

I, Edward Bermudez, chief justice of the supreme court of the State of Louisiana, do hereby certify that Joseph F. Poche is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of Joseph F. Poche to the foregoing certificate in the case of Texas and Pacific Railway Co. *vs.* Southern Pacific Railway Co., No. 10337 of the docket of this court, is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this 17th day of February, anno Domini 1890, and in the 114th year of the Independence of the U. S. of America.

Seal Supreme Court of the State of Louisiana.

E. BERMUDEZ,
Chief Justice Supreme Court of the State of Louisiana.

278 THE UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Texas & Pacific Railway Company, plaintiff, and The Southern Pacific Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or 279 statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twentieth day of January, in the year of our Lord one thousand eight hundred and ninety.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
L. Q. C. LAMAR,
Associate Justice Supreme Court U. S.

280 NEW ORLEANS, *Jan.* 28, 1890.

The plaintiff in error has this day lodged in my office a copy of the within writ of error for The Southern Pacific Company, the defendant in error.

[Seal Supreme Court of the State of Louisiana.]

JOSEPH F. POCHÉ,
Clerk Supreme C't La.

281 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Southern Pacific Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein The Texas & Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lucius Q. C. Lamar, associate justice of the Supreme Court of the United States, this twentieth day of January, in the year of our Lord one thousand eight hundred and ninety.

L. Q. C. LAMAR,
Associate Justice Supreme C't U. S.

282 Received Jan. 28, 1890.

On this 28th day of January, in the year of our Lord one thousand eight hundred and ninety, personally appeared John F. Tims before me, the subscriber, a deputy civil sheriff for the parish of Orleans, State of Louisiana, and makes oath that he delivered a true copy of the within citation to Joseph P. Blair, of the law firm of Leovy & Blair, attorneys for the Southern Pacific Company, of record.

JOHN F. TIMS,
Deputy Civil Sheriff, Parish of Orleans, Louisiana.

Sworn to and subscribed the 31st January, A. D. 1890.

{ Seal Civil District Court for the Parish of Orleans,
State of Louisiana. }

E. A. LUMINAIS, *Clerk.*

On this 29th day of January, in the year of our Lord one thousand eight hundred and ninety, personally appeared Peter McGrath before me, the subscriber, a deputy civil sheriff for the parish of Orleans, State of Louisiana, and makes oath that he delivered a true copy of the within citation to the Southern Pacific Company by leaving the same at their office, corner of Natchez and Magazine streets, in the hands of John G. Schriever, its agent and general traffic manager, the president and other superior officers being absent from said office at the time of said service.

PETER McGRATH,
Deputy Civil Sheriff, Parish of Orleans, Louisiana.

Sworn to and subscribed the 31st January, A. D. 1890.

{ Seal Civil District Court for the Parish of Orleans,
State of Louisiana. }

E. A. LUMINAIS, *Clerk.*

283 In the Supreme Court of the United States.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, *versus* THE SOUTHERN PACIFIC COMPANY, Defendant in Error.	Writ of Error, Returnable to the October Term, 1890.

And now comes The Texas & Pacific Railway Company, the plaintiff in this cause in the lower court and plaintiff in error in this court, and assigns for error in the judgment of the supreme court of Louisiana as follows:

First. The supreme court of Louisiana erred in affirming the judgment of the civil district court for the parish of Orleans in this cause.

Second. The supreme court of Louisiana erred in refusing the rehearing applied for by the plaintiff in error.

Third. The supreme court of Louisiana erred in holding that the agreement sued upon in this cause was not made the decree of the district courts of the Territories of New Mexico and Arizona, as claimed in the petition in this cause and shown by exhibits thereof and conceded by the exceptions of defendant.

284 Fourth. The supreme court of Louisiana erred in holding that the agreement sued upon in this cause was not made the decree of the court of the State of Texas, as set forth in the petition and exhibits of this cause and conceded by the exceptions of defendant.

Fifth. The said district courts of the Territories of New Mexico & Arizona being established by and under the Constitution and laws of the United States, and the said agreement sued upon having been made the decrees of said court respectively, and having by transaction or compromise been embodied in said decrees, the same have the effect in favor of the plaintiff of *res judicata*, and the supreme court of Louisiana erred in deciding to the contrary and denying the rights claimed by plaintiff thereunder.

Sixth. The agreement sued upon having been made a decree of the court of the State of Texas, as set forth in the petition and exhibits, and having been therein embodied by way of transaction or compromise, and the said decree of the Texas court being entitled to full faith and credit in this cause under section first of article fourth of the Constitution of the United States, the supreme court of Louisiana erred in deciding to the contrary and denying the rights of plaintiff as claimed thereunder.

Seventh. The supreme court of Louisiana erred in holding the agreement sued upon to be illegal, null, and void, the fact being that the said agreement sued upon was authorized by the Con-
285 gress of the United States by the act of March 3rd, 1871,
chapter 122, which incorporated the plaintiff and authorized it to make running arrangements with any railroad company existing or to be created, and by the act of Congress of June 22nd, 1874, set forth in the petition, and by the charter of the Southern Transcontinental Railway Company, incorporated by an act of the Legislature of Texas approved July 27th, 1870, which last-named company was merged in and consolidated with the plaintiff company, as set forth in said act of Congress of June 22nd, 1874, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes," and by the charter of the New Orleans Pacific Railway Company, being the act No. 14 of the General Assembly of Louisiana of 1876, which said New Orleans Pacific railway, its property, rights, and franchises,

were acquired by the plaintiff company under the authority of said acts of Congress.

Eighth. It appearing on the face of petition and exceptions, the agreement sued upon, and the testimony under said exceptions that the questions in this cause concern mainly interstate commerce between the Pacific and Atlantic Oceans and between Louisiana, Texas, and California, and that these are matters for the Congress of the United States to regulate under article first, section eighth, paragraph 3, of the Constitution of the United States, the supreme court of Louisiana erred in applying the law of Louisiana and the prohibition of its civil code or of any other State to annul such
286 an agreement or declare it unlawful.

Ninth. The court of the first instance in this cause having sustained the exceptions of the defendant and dismissed the cause upon the ground that the agreement sued upon was contrary to the prohibition contained in article 10, section 5, of the constitution of the State of Texas adopted in the year 1876, and having thus held that said prohibitions applied to the agreement sued upon and forbade its execution, although the said agreement was made by the plaintiff company under the powers granted by the Congress of the United States in the years 1871 & 1874 and by the State of Texas prior to said year 1876, as shown by the petition of this cause, the supreme court of Louisiana erred in affirming the said judgment of the said court of first instance in this cause in this, that the said clause of the constitution of Texas of 1876, as interpreted and applied, violates section 10 of article I of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

287 And for these errors and others apparent on the face of the record plaintiff in error prays that the judgment of the supreme court of Louisiana may be reversed, and for such other and further order, judgment, and relief as may be just.

W. W. HOWE,
Of Counsel for Pl'ff in Error.

Endorsed on cover: Louisiana supreme court. No. 1210. The Texas & Pacific Railway Company, plaintiff in error, *vs.* The Southern Pacific Company. Filed July 8, 1890.

FILED
OCT 10 1890
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1210.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

versus

THE SOUTHERN PACIFIC COMPANY, Defendant in Error.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

W. W. HOWE,
For Plaintiff in Error.

October 7th, 1890.

Jno. F. Dillon
of Counsel.

T. H. Thomason, Printer, 36 Natchez Street.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1210.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,

versus

THE SOUTHERN PACIFIC COMPANY, Defendant in Error.

In Error to the Supreme Court of the State of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The Chief Justice of the Supreme Court of Louisiana erroneously refused to allow the writ of error in this case, and the papers were submitted to his Honor Mr. Justice Lamar. He examined the principal portions of the record and decided that the writ should be granted.

The action was instituted originally in the Civil District Court for the Parish of Orleans. The petition sets forth that the plaintiff, the Texas and Pacific Railway Company, is a corporation created by and under the laws of the United States, to-wit: Under the Act of Congress approved March 3d, 1871, Chapter 122. Act approved May 2d, 1872, Chapter, 132. Act approved March 3d, 1873, Chapter 257. Act approved June 22d, 1874, Chapter 406. And that it has certain rights, property, powers, privileges and franchises by consolidation with it of the Southern Pacific Railway Company, of Texas, the Southern Transcontinental Company of Texas, recognized, affirmed and approved by said Act of Congress of June 22d, 1874; and that it had also acquired by deed of consolidation of June 20th, 1881, the railway and railway rights of the New Orleans Pacific Company, a corporation created by Act of the General Assembly of the State of Louisiana, No. 14, of 1876, being the consolidation referred to and recognized in the seventh Article of the Agreement "A," hereinafter set forth.

It further alleges that the plaintiff has places of business and offices in Dallas and Marshall, in the State of Texas, and in New Orleans, in the Parish of Orleans; and the lines of railway of said Texas and Pacific Railway extend or reach by track, running arrangements, or connections, from El Paso in the State of Texas to New Orleans, and to Galveston in the State of Texas.

The petition further alleges that on or about the 26th of October, 1881, Collis P. Huntington, of the City of New York, for and in behalf of himself (who now controls and operates the Company defendant in this case) and for and on behalf respectively of the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of Arizona, the Southern Pacific Railroad Company of New Mexico, the Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company of Texas, the Louisiana Western Railway Company of Louisiana, and any extension thereof owned or controlled by said Huntington or said Railroad Companies above named, or any of them, parties of the first part, and Jay Gould of the City of New York, for himself and associates, and for and on behalf respectively of the Texas and Pacific Railway Company, the International and Great Northern Railway Company, and the Galveston, Houston and Henderson Railway Company of Texas, and for and on behalf of the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company and the St. Louis, Iron Mountain and Southern Railway Company, parties of the second part, made and enter into an agreement of which a copy is annexed to the petition and made part thereof as exhibit "A."

The petition further alleges that on or about February 18th, 1885, said agreement was amended by the modification, of which copy is annexed to the petition, and made a part thereof, as Exhibit "B," (for petition see transcript, pages 1 to 7, and for Exhibits "A and B" pages 7 to 21 inclusive).

The petition further alleges that, as appeared by said contract, it was made not only in consideration of the mutual promises of the parties but also in consideration of the settlement of important litigation then pending between parties thereto in the courts of Texas, Arizona and New Mexico respecting claims of the parties of the first part and properties, rights of way and franchises of the Texas and Pacific Railway Company, not only in Texas but west of El Paso, and in consideration of the agreement of said Texas and Pacific Railway Company, as set forth in said contract, to construct its track and make a junction at the point selected eastwardly from El Paso, as set forth in Article one, to relinquish rights of the Texas and Pacific Railway Company in said territories of Arizona and New Mexico, set forth in Article two; to cede and transfer to said Southern Pacific Companies its land grants west of El Paso conferred on it by Act of Congress of March 3d, 1871, as set forth in Article three; and to cede to said Southern Pacific Companies its corporate rights and franchises west of El Paso, as set forth in Article four, and perform other obligations imposed on said Texas and Pacific Railway Company by said agreement. That, as provided by said agreement, the same and its modification had been duly adopted and ratified by the several corporations mentioned as parties therein, and said ratifications exchanged and the personal undertaking of said Gould and Huntington in the premises had ceased.

The petition further avers that all the acts required in said agreement to be done by the Texas and Pacific Railway Company had been done and all relinquishments, cessions, conveyances and transfers of rights, grants, property and franchises provided thereby to be made had been promptly made by it, and accepted by parties of the first part to said agreement, and by defendant in this cause; and the said agreement in all things had been duly complied with by said Texas and Pacific Railway Company, as well as by the other parties of the second part.

It further alleges that in pursuance of said agreement the same had been made a decree of the court in the said litigation referred to, in said courts of Texas, New Mexico and Arizona, as by duly certified copies of said decrees would appear; the same, of course, to be produced upon the trial of the cause upon the merits; and in the form shown by the copy annexed to the petition and made part thereof, as Exhibit "C," (for this exhibit see transcript, pages 21 to 25 inclusive) and it was alleged that these decrees conformed with and carried out said agreement.

The petition then proceeds to repeat Article six of the agreement "A" already pleaded, annexed to and made part of the petition, and the modification therein made by the Exhibit "B" already pleaded and annexed (see transcript, pages 3 and 4) and then proceeds to allege that the defendant in this cause, the "Southern Pacific Company," a corporation of Kentucky, having its place of business in New Orleans and controlled by Collis P. Huntington, had about November, 1884, taken possession and control of all railway companies mentioned in said agreement as parties of the first part, and also of the Morgan Texas Railroad and Steamship Companies, being the Morgan Line mentioned in the agreement, whereby its system was extended to and reached the city of New Orleans and extended by Morgan Steamer to New York; and had taken possession of the properties of said companies, and the properties and rights transferred by said agreements; and had since been and still was operating said steamers and railroad as its own, forming through lines from California, New Orleans and New York, and the Atlantic System of said Southern Pacific Company was alleged to form a through line from and to El Paso and New Orleans, and by connection and running arrangements to and from Galveston and said other points.

The petition further avers that upon taking possession and control as aforesaid, the said Southern Pacific Company adopted as its own the said agreement and modification ("A" and "B") and assumed the same in all respects, and claimed all rights thereunder as party of the first part, and rendered sundry accounts to the Texas and Pacific Railway Company and statements in writing concerning New Orleans and Galveston traffic under said agreement and modification, and received statements thereunder from plaintiff, and since said adoption and assumption, had been and was liable as party of the first part for all the obligations of the parties thereto, and of their extension to New Orleans and New York, the said Morgan, Louisiana and Texas Railroad and Steamship Company. That down to March 31st, 1887, said Southern Pacific Company has rendered to the plaintiff monthly statements of said business done by it under said agreement and modification and subject to division under the same as therein provided.

It will be observed that the agreement sued upon provides by this Sixth paragraph as modified by the Exhibit "B" for a division of the earnings therein described. It provides simply for a division of certain earnings in certain proportions. It does not forbid or prevent competition; it does not fix or raise any rates; it does not undertake to divide all earnings nor is it anywhere even alleged in the record that it had or could have any such effect, or inflict any injury on the public.

The petition further alleges that the defendant in writing and by its acts had adopted and assumed the said agreement, operated its lines thereunder, possessed and enjoyed the property and rights conveyed in pursuance thereof by plaintiff and recognized plaintiff as the party to whom the accounting should be made, and with whom settlements should be made under the agreement sued upon.

It is further alleged that by Article fifteen of the agreement it is provided that the plaintiff might sue alone to enforce its rights; that no objection should be taken by reason of non-joinder, and that the defendant the Southern Pacific Company has repeatedly in writing, and otherwise dealt with the Texas and Pacific Railway Company as to the obligation of said agreement with respect to said New Orleans and Galveston traffic, and the other obligation thereof.

That about March, 1887, the defendant entered upon an arbitration with plaintiff alleging that it was willing to settle the demand of plaintiff as then existing as well as certain questions of dispute then unjustly set up by defendant Company, but that after much labor and argument said arbitration was broken up by the fault of said Southern Pacific Company.

The petition then proceeds to state the amount due to the Texas and Pacific Railway Company under the agreement sued upon as aggregating upwards of five hundred thousand dollars, and prays for judgment for the amounts due and to be found due, with interest, etc. (Transcript, pages 6 and 7).

The defendant Company appeared and under the practice of Louisiana filed exceptions (Transcript, pages 25 to 28). The exceptions so far as it is necessary to consider them are *peremptory* in their character, and are in the nature of demurrers. It is elementary that as such they admit the truth of all the allegation of facts set forth in the petition, and in the exhibits which are annexed to said petition and form part thereof. Briefly stated, they are as follows:

1st. That the agreement sued upon although made in good faith was contrary to public policy and null and void.

2d. That the agreement sued upon violated Article 10, Section 5 of the Constitution of the State of Texas, with respect to consolidation of parallel or competing lines of railroad or control of one by the other.

3d. That the agreement was terminated by the Interstate Commerce Law of Congress, Chapter 104 of Acts of 1887.

The defendant appears also to have interposed (transcript, pages 27 and 28), a dilatory exception as to want of specification by plaintiff in the items of its money demand, but this exception was never urged or passsed upon, and was irregular in itself, inasmuch as under the practice of Louisiana, a dilatory exception cannot be filed after a peremptory one. And in any event the defendant did not propose to have it considered unless the peremptory exceptions were overruled. Further allusion therefore to this dilatory exception need not be made.

Upon the hearing of the exceptions in the Court of first instance, a mass of testimony was taken which will be found at pages 52 to 131 of the transcript. To explain why testimony should be taken in respect to peremptory exceptions, it should be observed that this evidence is either geographical in its character, or consisted of the offering of a large number of Acts of Congress and Statutes, which perhaps might as well have been referred to in the public laws, but which nevertheless were put in.

The Acts of Congress of the United States and other legislation with respect to the Texas and Pacific Railway Company, specially offered in evidence by the plaintiff, are found at pages 80 to 130 of the transcript, so that the lower Judge had before him not only the admitted allegation of the petition, the admitted allegation and recitals of the exhibits "A," "B," "C," of that petition; but, also all the Acts of Congress and other legislation with regard to the plaintiff's Company, showing the power and authority of the plaintiff Company to make the contract sued upon, and the want of power in the States to interfere with that contract. The Judge of the Civil District Court rendered a judgment on the exception in the following words (Transcript, page 76):

"In these exceptions submitted to the Court for adjudication, and the Court considering the prohibition contained in Article 10, Section 5 of the Constitution of Texas, adopted in 1876, and for reasons orally assigned by the Court, and the law and evidence being in favor of plaintiff in exception, it is ordered that the peremptory exceptions filed herein on May

19th, 1888, be maintained and accordingly that plaintiff's suit be dismissed."

It is manifest that this was a decision that the agreement sued upon conflicted with the Constitution of Texas, of 1876, respecting the consolidation of one parallel or competing railroad with another or the control of one such railroad by another. Such being the decision, the plaintiff moved for a new trial for the reasons stated in the transcript, page 77, and the motion for a new trial being refused, took an appeal to the Supreme Court of Louisiana, transcript, page 78, and filed an assignment of errors predicated, of course, upon the decision of the lower Judge (transcript, page 131). Appeals in Louisiana are like those in equity. The Court of last resort acts on the law and facts as presented by the whole record. Cousin vs. Blanc, 19 Howard, 267; Almonaster vs. Kenton, 9 *Id.* 9. The Supreme Court of Louisiana affirmed the judgment of the lower court, not upon the ground that the lower Judge was correct in his views with respect to the relation between the contract sued upon, and the Constitution of Texas, but on quite different grounds. The Court stated (Transcript, page 135):

"The point which overshadows the discussion of all three of the exceptions is made by plaintiff's counsel, who contends that the agreement between the parties having been sanctioned by a decree of the courts in which the litigation adjusted between the railroad companies was pending, it has now acquired the force and effect of the thing adjudged, and hence it cannot be attacked collaterally. As a general proposition of law, the contention is unquestionably correct."

The court proceeds however to decide, that while the petition alleged that the agreement sued upon had been made the decree of the territorial courts of New Mexico and Arizona, as well as the court of the State of Texas, and in the form set forth in Exhibit "C" of the petition, and although these facts were admitted by the peremptory exceptions or demurrers, yet that the agreement, so far as the division of earning clause sued upon is concerned, was not embodied in the said decrees. In doing so the Supreme Court of Louisiana necessarily passed upon the tenor and effect of decrees of the territorial courts of New Mexico and Arizona, which tribunals were established under the Constitution and laws of the United States. In other words, the plaintiff claimed by virtue of said decrees of the territorial courts of New Mexico and Arizona, an important right conferred by the Constitution and laws of the United States which established those courts, and the Supreme Court of Louisiana denied the right. The Supreme Court of Louisiana also denied the rights assured to plaintiff by the Constitution and laws of the United States with respect to the similar decree made by the Texas Court. In short, the Supreme Court of Louisiana held that our agreement was not made the decree of those courts, and thereby declared binding on all the parties thereto, although the defendant's peremptory exceptions admitted that it was. Having thus summarily denied these important rights, the Supreme Court of Louisiana proceeded to hold that the agreement sued upon was null and void, as contrary to public policy, and after citing a number of cases which were not at all in point, in which illegal combination had been made for the purpose of fixing rates and stifling competition, proceeded to apply the law of Louisiana for the purpose of destroying the power of making contracts which had been conferred in 1871 and 1874, by the Congress of the United States, upon the Texas and Pacific Railway Company. The petition of plaintiff was before them, the agreement sued upon and its modifications were annexed to and made part of that petition. The agreement sued upon, and made part of the petition, declared that the Texas and Pacific Railway Company had the power, under the Acts of Congress, to make the agreement sued upon (Transcript, page 15). Yet the Supreme Court of Louisiana said (Transcript, page 141):

"Under our own system the doctrine is not only sanctioned by judicial authority, but it has been specially incorporated in our Code in its wide range of remedies for wrongs and enforcement of rights."

"Article 1893 reads: 'An obligation without a cause or with a false or unlawful cause, can have no effect.'

"Article 1898 provides: 'The cause is unlawful when it is forbidden by law—when it is *contra bonos mores* (contrary to moral conduct) or to public order.'"

In other words, while on the face of the petition and exhibits and the legislation offered in evidence by the plaintiff and the admission made by the peremptory exceptions of the defendant, it appeared to the Supreme Court of Louisiana, and was urged in argument there as well as in the lower court, that the agreement sued upon was authorized by the Congress of the United States by the Act of March 3d, 1871, chapter 132, which incorporated the plaintiff and authorized it to make running arrangements with any railroad company existing or to be created; by the Act of Congress of June 22d, 1874; and by the charter of the Southern Transcontinental Railway Company, incorporated by Acts of the Legislature of Texas, and approved July 27th, 1870, which last named company was merged in the plaintiff's Company, as set forth in said Act of Congress of June 22d, 1874,—yet the right to make the contract was denied and it was declared null and void.

But more than this, it appeared on the face of the petition and exceptions and the agreement sued upon, and the testimony taken with regard to geographical facts, and the character of business done under the agreement, that the questions in this case mainly concerned Interstate Commerce between the Pacific and Atlantic Ocean, and between Louisiana, Texas and California. It plainly appeared on the face of the pleadings, documents and testimony, and was argued both to the lower Court and the Supreme Court of Louisiana, that the regulation of this Interstate Commerce, and the contracts with respect thereto were matters for the Congress of the United States under Article 1, Section 8, paragraph 3, of the Constitution of the United States. Yet the Supreme Court of Louisiana as well as the lower court insisted on applying State law to this matter, and denied to the plaintiff its rights under the commerce clause of the Constitution of the United States.

And finally, if the affirmation by the Supreme Court of Louisiana of the decision of the Civil District Court be held to affirm the views of the lower Judge, that the agreement sued upon contravened the Constitution of Texas of 1876, then it denied to plaintiff another important federal right, because the right to make the agreement sued upon was conferred upon the plaintiff by the Congress of the United States in 1871 and 1874, and to hold that it could be impaired by the Texas Constitution of 1876, is to interpret and to apply the Texas Constitution in such a way as to make it infringe the powers of Congress and violate Section 10 of Article one of the Constitution of the United States, which forbids a State to enact any law impairing the obligation of contracts, and also to violate the commerce clause of the Constitution.

The Application for Rehearing.

Under the law of Louisiana the opinion of its Supreme Court does not ripen into a *final* decree until the party against whom it has been rendered has had an opportunity, during six judicial days, to present a petition for a rehearing. The Code of Practice declares:

"Art. 911. The judgments rendered by the Supreme Court at New Orleans shall be final, and the clerk shall deliver a copy to every person requiring it, after six judicial days shall have elapsed from the rendering of the judgment; and the parties shall have *a right*, at any time within said delay, to apply for a rehearing according to existing laws."

"Art. 912. In the interval between the day on which the judgment is rendered *and that on which it becomes final*, a party dissatisfied with the judgment may apply to the Court for a new hearing of the cause, and for this purpose shall present a petition in which he shall state substantially the reasons for which he thinks the judgment erroneous, and shall cite the authorities in support of his opinion."

The judgment then does not become final, cannot be executed, and remains as a sort of a " suspension of opinion" until the petition for a rehearing is passed upon. If a rehearing be refused, the judgment then, and not till then, becomes final. See Almonaster vs. Kenton, 9 Howard, 1, 9.

To apply for such a rehearing is a matter of right.

The plaintiff duly filed its petition for this purpose, which is found at pp. 145 to 152 of the Transcript. Your Honors will read it. It urges on the Supreme Court of Louisiana the rights of the plaintiff which had been denied by the opinion complained of and demonstrated, as we submit:

1. That the Court had erred in denying to plaintiff its rights under the decrees of the Territorial Courts and the Court of Texas.

2. That the Court had denied the rights which had been claimed by plaintiff to make the agreement sued on under the Acts of Congress set forth in the petition and its exhibits, and the rights acquired under said Acts of Congress; and especially by § 5 of the Act of Congress of March 3d, 1871, Chap. 122, (Transcript, p. 82), by the Charter of the Transcontinental Company, § 3, (Transcript, p. 108) and by the ratification of this by the Act of Congress of June 22d, 1874, (Transcript, pp. 90 and 91).

3. That the Court had denied the right of plaintiff to make and enforce the agreement and had applied State law for this purpose, when it appeared on the face of the pleadings and the testimony that the agreement concerned mainly interstate commerce, which Congress alone could regulate, and when Congress had not prohibited such an agreement.

The Court refused the rehearing (Transcript, p. 152). In other words, *before its judgment became final* it overruled these points. Before its opinion and decree became final, it had an opportunity and was besought to again discuss and pass upon these federal questions. It did pass on them by refusing the rehearing and denying our rights, and then, and not till then, its judgment became final.

In the case of Stewart vs. Kahn, 11 Wallace, p. 493, your Honors correctly maintained jurisdiction of a writ of error to the Supreme Court of Louisiana taken as in this case by plaintiff in the lower court, where the federal right appeared in the record for the first time in the petition for rehearing in the appellate State court.

The point there made by the counsel for plaintiff Stewart, who was plaintiff below, that under the Louisiana practice there is no replication, and that the petition for rehearing, put in before the judgment of the highest Court of Louisiana had become final, presented the federal question, was maintained, and the judgment, which became final only after this petition had been filed, was reversed.

The case of Boom Co. vs. Boom Co., 110 U. S. 57, relied on by our opponents, does not conflict with this view, for in that case it is declared that the judgment of the Supreme Court of Pennsylvania had become *final before* the petition for rehearing was filed, and the question was not in the case "up to the time of the final decision." In other words, on account of the difference between the Louisiana practice and that of Pennsylvania, the petition for rehearing was, in Stewart vs.

Kahn, as in the case at bar, a part of the record before the judgment of the Louisiana Court became final. In Stewart vs. Kahn, as in this case, the Louisiana Court had the questions before it, and passed on them adversely to claims of plaintiff in error.

THE FEDERAL QUESTIONS.

In the first place let it be noted that under the decision in the Pacific Railroad Removal cases, 115 U. S. 1, this suit arose "under the laws of the United States;" that every act of the plaintiff, including its rights and obligations under the contract sued on, arose under the Congressional law of its being (115 U. S., p. 14), and in the luminous language of that decision, "the whole being, capacities, authority and obligations of the Company [plaintiff] * * * are so based upon, permeated by and enveloped in in the acts of Congress referred to, that it is impracticable, so far as the operations and transactions of the Company are concerned, to disentangle those qualities and capacities which have their source and foundation in these acts from those which are derived from the State or Territorial authority." 115 U. S., p. 16.

If this be logically true in the three cases of the Texas and Pacific Railway. Company, in 115 U. S., now cited, where the actions sounded in tort because McAllister, Kirk and Murphy had been injured by cars of that Company, *a fortiori*, we should imagine, would the same truth be substructural and organic in the instant case, where the suit is brought upon a contract in which, *totidem verbis*, all parties appeal to the Acts of Congress as the source of the plaintiff's power and capacity to make it.

It is not necessary to contend, or to decide, that every suit brought by the Texas and Pacific Railway Company in a State Court can be eventually removed by writ of error to this tribunal. The principles enunciated in the cases cited from the 115th U. S. are referred to as elementary, as fundamental, as seminal. They are touchstones, to be applied to the special facts of this controversy. What are those special facts?

We repeat that the suit was begun to recover sundry large amounts due the plaintiff Company under the agreement of November 26th, 1881, and its modification of 1885, known as, and here called for convenience, the Gould-Huntington Agreement. The agreement and its modification were annexed to and made part of the petition as Exhibits "A and B." And the form of the decree of the Courts of the territories, and of Texas, was annexed as Exhibit "C," Transcript, pp. 1-21.

The effect of such pleading under the Code of Practice of Louisiana is not doubtful. Documents sued on and annexed to and made part of a petition are just as much a part of it, and of its averments, as if they had been recited word for word in the petition itself. Nay, more, if there should be any error in the petition, a document sued on, annexed and made part, would control and correct. Hughes vs. Harrisson, 7 Martin, N. S. 227; D'Invilliers vs. Second Municipality, 5 Robinson (La.) 123; Rugely vs. Goodloe, 7 La. Annual, 295; Johnson vs. Gennison, 18 La. Annual, 275; Teutonia National Bank vs. Wagner, 33 La. Annual, 732.

In other words, the agreements and other exhibits of the petition in this case form part of it, and the petition stands as if the pleader had, with a repetition which would have been vain, at least in Louisiana, averred and reiterated all the recital, statements, admissions and promises of the parties.

The cause has never been tried on its merits. The defense set up consisted of three exceptions, already recited. The law in regard to these should not be confused by any reference to the rules in regard to "pleas" at common law or in equity. They are demurrers. They admit every averment of fact in the petition and in its exhibits made part thereof.

The case was argued to the court of first instance on these pleadings and the geographical testimony and the second exception apparently maintained.

Appeal is taken to the Supreme Court of Louisiana and the first exception maintained. Rehearing is asked for by a petition filed, as matter of right, before the judgment of the highest court became final, so that the Supreme Court of Louisiana could reconsider its denial of our federal rights. The record shows that the Court reconsidered the federal questions for more than one month and then refused a rehearing. And then its judgment denying our federal rights became final on the 31st December, 1889, p. 152. If these facts do not give jurisdiction by writ of error to this Court, then the law and jurisprudence have been greatly misunderstood. The truth is that, from the inception of the case, these federal questions have inhered in the cause. They have at all times been present asserting themselves as against State law.

In Cornell University vs. Fiske, 136 U. S. 152, attempt was made, as in the instant case, to deny your jurisdiction, pp. 162 *et seq.* But it was held, p. 176, that there was jurisdiction in this Court by writ of error. We have a stronger case than that.

In Chapman vs. Goodnow, 123 U. S. at p. 548, it was said:

"If a Federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it is as much against the right * * as if it had been specifically referred to and the right directly refused."

And see Arrowsmith vs. Harmoning, 118 U. S. 194; Cousin vs. Blanc, 19 Howard, 202, and Anderson vs. Carkins, 135 U. S. 483.

Referring to the language lastly above quoted, we here print for convenience the assignment of errors made by plaintiff at bar in this Court.

"First. The Supreme Court of Louisiana erred in affirming the judgment of the Civil District Court for the Parish of Orleans in this cause.

"Second. The Supreme Court of Louisiana erred in refusing the rehearing applied for by the plaintiff in error.

"Third. The Supreme Court of Louisiana erred in holding that the agreement sued upon in this cause was not made the decree of the District Courts of the territories of New Mexico and Arizona, as claimed in the petition in this cause, and shown by exhibits thereof, and conceded by the exceptions of defendant.

"Fourth. The Supreme Court of Louisiana erred in holding that the agreement sued upon in this cause was not made the decree of the Court of the State of Texas, as set forth in the petition, and exhibits of this cause, and conceded by the exception of the defendant.

"Fifth. The said District Courts of the territories of New Mexico and Arizona being established by and under the Constitution and laws of the United States, and the said agreement sued upon having been made the decrees of said Court respectively, and having by transaction or compromise been embodied in said decrees, the same have the effect in favor of the plaintiff of *res judicata;* and the Supreme Court of Louisiana erred in deciding to the contrary, and denying the rights claimed by plaintiff thereunder.

"Sixth. The agreement sued upon having been made a decree of the Court of the State of Texas, as set forth in the petition and exhibits, and having been therein embodied by way of transaction or compromise, and the said decree of the Texas Court being entitled to full faith and credit in this cause under Section First, of Article Fourth, of the Constitution of the United States, the Supreme Court of Louisiana erred in deciding to the contrary and denying the rights of plaintiff as claimed thereunder.

"Seventh. The Supreme Court of Louisiana erred in holding the agreement sued upon to be illegal, null and void; the fact being that the said agreement sued upon was authorized by the Congress of the United States by the Act of March 3d, 1871, Chapter 122, which incorporated the plaintiff, and authorized it to make running arrangements with any railroad company existing or to be created, and by the Act of Congress of June 22d, 1874, set forth in the petition, and by the Charter of the Southern Transcontinental Railway Company incorporated by an Act of the Legislature of Texas, approved July 27th, 1870, which last named Company was merged in and consolidated with plaintiff Company, as set forth in said Act of Congress of June 22d, 1874, entitled 'An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes,' and by the Charter of the New Orleans Pacific Railway Company, being the Act No. 14 of the General Assembly of Louisiana of 1876, which said New Orleans Pacific Railway, its property, rights and franchises were acquired by the plaintiff Company under the authority of said Act of Congress.

"Eighth. It appearing on the face of petition and exceptions, the agreement sued upon, and the testimony under said exceptions, that the questions in this cause concern mainly Interstate Commerce between the Pacific and Atlantic Ocean, and between Louisiana, Texas and California, and that these are matters for the Congress of the United States to regulate, under Article First, Section Eight, Paragraph 3, of the Constitution of the United States, the Supreme

Court of Louisiana erred in applying the law of Louisiana and the prohibition of its Civil Code, or of any other State, to annul such an agreement or declare it unlawful.

"Ninth. The Court of first instance in this cause having sustained the exceptions of the defendant, and dismissed the case upon the ground that the agreement sued upon was contrary to the prohibition contained in Article 10, Section 5, of the Constitution of the State of Texas, adopted in the year 1876, and having thus held that said prohibitions applied to the agreement sued upon, and forbade its execution, although the said agreement was made by the plaintiff Company under the powers granted by the Congress of the United States in the years 1871 and 1874, as shown by the petition of this cause, the Supreme Court of Louisiana erred in affirming the said judgment of the said Court of first instance in this cause, in this, that the said clause of the Constitution of Texas of 1876, as so interpreted and applied by the Court, violates Section 10 of Article I of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

"And for these errors and others apparent on the face of the record, plaintiff in error prays that the judgment of the Supreme Court of Louisiana may be reversed, and for such other and further order, judgment and relief as may be just."

Now, bearing in mind the language of the court quotedabove from the 123d U. S., it appears:

(1) That the plaintiff pleaded and claimed its rights under the decrees of the Territorial Courts of New Mexico and Arizona, of which the Gould-Huntington Agreement "A" was made part and decreed to be bind-

ing upon the parties. These decrees each declared as follows:

"The aforesaid decree is made to carry out the provisions in this behalf of said agreement, dated November 26th, 1881, which is hereby made a part of this decree, and by consent of the parties, and upon consideration by the Court, IS HEREBY ORDERED AND DECREED to be binding upon each and all of the parties hereto in all its stipulations and agreements, as therein shown, and said decree does not otherwise affect or interfere with the provisions of said agreement."

Transcript, pp. 25 and 145.

These decrees, as well as the similar one in the Texas Court, sustains our claims thereunder, which the Supreme Court of Louisiana has denied. Each makes the whole Gould-Huntington Agreement part and parcel of the decree; the whole, and not a part. It declares in the part lastly quoted that the *said agreement* of November 26th, 1881, IS hereby ordered and decreed to be binding upon each and all of the parties hereto *in all its stipulations and agreements as therein shown.* All the parties of the first part are admitted to be represented and run by the defendant in this case. And among all the stipulations and agreements, as therein shown, is the division of certain earnings sued upon in this case. A plainer case of transaction or compromise, embodied in decrees of Court, and having the effect of *res judicata*, has never been seen. Oglesby vs. Atrill, 105 U. S. 605. The District Courts of New Mexico and Arizona are established under the

Constitution of the United States, by the Congress thereof. The litigation arose under the Constitution and laws of the United States, and especially under the Acts of Congress with reference to the Texas and Pacific Railway Company, recited in the petition in this cause. The said Territorial Courts had jurisdiction under the Acts of Congress, Rev. Stat. of the United States, Sections 1839 to 1895, and Section 1910, Constitution of the U. S., Art. IV, Section 3, par. 2.

And the similar decree of the Texas Court is entitled to full faith and credit in this cause under the same Article, Section 1. And we claimed our rights under the Constitution and laws of the United States, in the pleadings in the lower court, in the Supreme Court of Louisiana, and again by petition for rehearing before the judgment of the latter court became final. In Giles vs. Little, 134 U. S. 649, it was said: "If the State Court had refused to give due effect to a final judgment of any court of the United States, in a case between the same parties, a federal question would have been presented, which might have been brought to this Court for review. Dupasseur vs. Rochereau, 21 Wall. 130; Crescent City Co. vs. Butchers' Union Co., 120 U. S. 141." To which we may add the case of Mechanics' Bank vs. Union Bank, 22 Wall. 276. The Southern Pacific Railway Companies of Arizona and New Mexico were parties to those suits, as was the plaintiff, and to the Agreement "A," and the defendant at bar is admitted to have succeeded to their rights and liabilities under said agreement, and the Supreme Court of Louisiana having interpreted these decrees, so as to deny our rights, as pleaded and claimed, a writ of error properly lies to bring the question here.

Our learned opponents seem to see this quite plainly and try to avoid the result by criticism of the pleading. We pleaded the decrees referred to, certified copies to be produced on the trial of the merits, and annexed the precise form and language of them, which was admitted to be correct. And the State Court was satisfied with the method of pleading, declared that the point "overshadowed" the case, and passed on its merits. It would be something astounding if the defendant could now be heard to say that the presentation of the point was not technically and sufficiently specific.

(2) It further appears that, by the pleadings, the exhibits, the arguments, and the petition for rehearing, the POWER of the plaintiff to make the agreement sued on was from the beginning urged upon the State Court. It was set forth in the petition, recited in the agreement, Exhibit "A," (Trans. p. 15), controverted necessarily by the first and second exceptions, denied by the lower Judge, alluded to in the motion for a new trial, p. 77, reiterated in the assignment of errors in the Supreme Court of Louisiana, p. 131; argued to the Court; and then, before the judgment became final, reiterated in the petition for rehearing, pp. 149, 150.

The question of POWER conferred by Congress has been in the case from the beginning and the POWER was necessarily denied by the State Court.

The cases of Boom Co. vs. Boom Co., 110 U. S. p. 58, and Detroit Ry. Co. vs. Guthard, 114 U. S. 133, cited against us, are not in point. The respective plaintiffs in error in those cases were not incorporated by Congress, had made no agreement under federal authority, and did not, of course, declare on any such agreement.

We have a right then to lay the question, by writ of error, before this Court, whether or not we have Congressional authority to make the agreement sued on, and whether it can be denied by the State Court as it has been in this case.

(3) It further appears on the face of the pleadings, the exhibits, the exception of defendant, the testimony, p. 58, the motion for a new trial, p. 77, the assignment of errors, the opinion of the Supreme Court of Louisiana (Cousin vs. Blanc, 19 Howard, 207), and the petition for rehearing filed before final judgment, that the agreement sued on mainly concerned Interstate Commerce between the Pacific and Atlantic Oceans, and between Louisiana, Texas and California. We have claimed from the beginning the power under our federal charters to make the agreement sued on, and that it was not forbidden, but distinctly authorized by the Congress of the United States. This was matter for Congress to regulate under the commerce clause of the Constitution of the

United States, and any attempt to annul the agreement by applying restrictions of State law to it is illegal. Hall vs. Decuir, 95 U. S. 485; The Wabash Case, 118 U. S. 557. This Wabash case was repeatedly expounded in this litigation both to the lower and upper State Court, and is conclusive. It is no answer in a motion to dismiss to say that the agreement sued on is illegal. That is begging the question. We claim congressional power to make it, and sole congressional jurisdiction to control such matters. This is a federal question which we have a right to present by writ of error. What this Honorable Court will decide in regard to it will be an interesting subject of argument, oral and printed when the cause is reached. The defendant can afford to wait. It has thus far kept the vast considerations it received under the agreement sued on, and postponed at least the payment of the large sums it owes. It is not plaintiff in the suit and is not being delayed.

(4) In the application for a rehearing, at p. 152 of the Transcript, it was said:

> " The questions of the effect of the Texas Constitution and of the Interstate Commerce Law do not seem to have been passed on by the Court. Upon these questions we submit again the views contained in our brief heretofore printed."

If, by reason of the lower State Court maintaining the exception founded on the supposed effect of the Texas Constitution of 1876, and then, if its judgment be literally interpreted, maintaining all the exceptions, and this judgment being affirmed by the Supreme Court of Louisiana, the questions must be discussed of the right of the State of Texas to take away from us in 1876, powers conferred by Congress in 1871, 1873 and 1874, and also of the effect of the Interstate Commerce Law of 1887 in terminating an authorized contract made in 1881; then we have in the record, presented and discussed, from the beginning, two more important federal questions.

MOTION TO AFFIRM.

We submit that the motion to dismiss should be denied—and it seems plain to us that the motion to affirm should also be refused. Motions to affirm, cutting off oral and complete discussion, should, we imagine, only be granted in a plain case, and, perhaps, as a rule, when the defendant in error has a judgment which it would be unjust to tie up without cause. This case and the defendant are in no such category.

1. The Supreme Court violated law, as well as the rules of grammatical construction, in deciding against our claim that the agreement sued on was made a decree of the Territorial Courts of New Mexico and Arizona, as well as of the Texas Court, and thereby adjudged to be binding on all the parties thereto. We repeat the language admitted on all hands to be true:

"The aforesaid decree is made to carry out the provisions in this behalf of said agreement, dated November 26th, 1881, which is hereby made a part of this decree, and by consent of the parties, and upon consideration by the Court, IS HEREBY ORDERED AND DECREED to be binding upon each and all of the parties hereto in all its stipulations and agreements, as therein shown, and said decree does not otherwise affect or interfere with the provisions of said agreement."

The defendant in error is greatly mistaken in its brief in the statement that the parties to those decrees and to this suit were not the same in the legal sense. The Southern Pacific Railroads, respectively, of California, of New Mexico and of Arizona and the Galveston, Harrisburg and San Antonio Railway Company, on the one hand, and the Texas and Pacific Railway Company, on the other, were parties, and this is shown by the admitted allegations of the petition and the Exhibits "A" and "C," by the exceptions, and by the opinion of the Supreme Court of Louisiana. And the defendant in error is successor and privy to the parties opposed to the Texas and Pacific Railway Company in that litigation and conceded to be so, and liable as such. And the Supreme Court of Louisiana manifestly held our claim of transaction, compromise and *res adjudicata* to have been properly pleaded, and that it would have been perfectly good except that in the opinion of the Court the *portion* of the agreement sued on was not sanctified and made binding by the decrees. To reach this conclusion the Court misinterpreted the decrees—and erroneously declared that while they sanctified one part of the agreement, they did not sanctify the section sued on. This was a manifest blunder which we sought in vain to correct by the petition for a rehearing. The clause quoted above adjudges that the said agreement of November 21st. 1881, is hereby ordered and decreed to be binding upon each and all of the parties litigant, including the principal parties to the agreement sued on, and their privies by the agreement, and their successor and privy, the defendant at bar. At the risk of being tedious, we repeat substantially what we repeatedly argued in the lower and higher State Court on this subject, to show that the agreement is a unit, that it was sanctified by the decrees as such, and that the attempt to validate it in part, and destroy it in part, is most unjust.

It is not correct, we submit, to assert that these decrees do not have the effect we claim for them, because they each say that "the said decree does not otherwise affect or interfere with the provisions of said agreement."

Manifestly the litigation was settled or compromised by the agreement; and the decrees recognize and sanction the agreement as a whole, and show, among other things, that the quarrel as to a great right of way was settled, and a great land grant and valuable franchises conveyed. The obligations as to those are complied with, but this compliance and its decreed consequences are not to otherwise affect or interfere with the provisions of the said agreement. That is, they are not to be prejudiced, or declared as yet complied with. They are to stand, recognized and confirmed by the decree, which recognized and confirmed, and declared binding, the whole agreement.

It is admitted by the lower court, in its opinion, that the conclusion it arrived at can only be reached by separating the "Gould-Huntington Agreement" into a number of independent contracts. We submit that such separation is erroneous, and we point to the alarming injustice that must result from this error. We are to give everything, and receive nothing. A Court will be astute to avoid such a conclusion; but no astuteness, we submit, is necessary to avoid such a result.

The agreement speaks for itself in no uncertain way. The preamble contains the following recitals, which apply to the whole agreement as fully as the preamble of the Constitution applies to the whole instrument:

"WITNESSETH: *That Whereas*, the said Huntington and his associates own and control a majority interest in the said companies for whose behalf he acts as aforesaid;

"*And Whereas*, the said Gould and his associates own and control a majority interest in the companies for whose behalf he acts as aforesaid;

"*And Whereas*, divers differences have arisen and exist between the three Southern Pacific Railroad

Companies above named, and the said Galveston, Harrisburg and San Antonio Railway Company, on the one hand, and the Texas and Pacific Railway Company on the other;

"*And Whereas*, in respect to some of the said differences, various suits are now pending in the courts of Arizona, New Mexico and Texas, threatening long-continued, troublesome and expensive litigation;

"*And Whereas*, the continuance of such litigation is injurious to all of said Companies, and incidentally to the public interests, so far as the business of said lines is concerned;

"*And Whereas*, said differences and litigation have been found, upon conference and deliberation, to be susceptible of amicable adjustment, as in this contract provided;

"*And Whereas*, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis, Iron Mountain and Southern Railway Company own and control lines of railroad connecting with the road of the Texas and Pacific Railway Company, and are interested in the subject-matter of this agreement, except so far as pertains to the direct controversies in the pending suits between the said Southern Pacific Railroad Companies and the Galveston, Harrisburg and San Antonio Railway Company, on the one side, and the Texas and Pacific Railway Company on the other.

"*Now, therefore*, the parties hereto, with a view permanently to settle *all controversies* between said Companies of the first part, or any one or more of them, and the Companies of the second part, or any one or more of them, and to prevent *further controversies, and in consideration of the premises* and of the MUTUAL COVENANTS hereinafter contained, the parties hereto do covenant, promise and agree, each with the other, as follows:"

Then come the different parts of the agreement. They are numbered for the sake of convenience, as the different parts of the body are catalogued by the anatomist, but they form one agreement, even as such a body is one.

It is in vain to reply that the agreement was to be ratified by the different companies. That was necessary as a matter of proper business precaution, but what was to be ratified? A congeries of different agreements? No. "The foregoing agreement," as a unit, whose unitary consideration is not to be divided up and frittered away as to us, and left to be enjoyed by the other side in full.

Nor does the clause in regard to suits sustain the conclusion of the State Courts. It points to the reverse. If the document was a congeries of different agreements the clause might have been omitted. Its presence indicates a perfect consensus of opinion at that time by the parties that the agreement was a unit and that therefore this right of individual action should be conferred. Permit us to repeat what we have already said in a brief on the first argument in the Supreme Court of Louisiana:

"*The Unity of the Contract and the Unity of the Consideration.*

"This is apparent from the fact that it is an agreement between Mr. Gould upon one side and Mr. Huntington upon the other—Mr. Huntington as controlling the majority of the stock of the Companies for which he acted and Mr. Gould as controlling the majority of the stock of the Companies for which he acted. So, that really it was Mr. Gould on one side and Mr. Huntington upon the other, in respect to the properties controlled by them respectively. There were differences between the Pacific Railroad Companies and the Galveston, Harrisburg and San Antonio Railroad Company on the one side and the Texas and Pacific Company on the other. Some of these differences had brought on litigation then pending in the courts of Arizona, New Mexico and Texas. The object of this agreement was to settle all these differences and all litigation between Mr. Gould and Mr. Huntington, or the corporations controlled by them. That agreement was entered into, as it appears on its face, with a view, permanently, to settle all these differences and all litigation between Gould and Huntington; to settle all controversies between the Companies, or any one of them, on the one side, and the Companies, or any one of them, on the other side, and to prevent all future controversies between any and all of them. It was an agreement entered into of an enduring character, because, in the 15th Article it is provided, 'that the agreements, and each of them herein, are of perpetual obligation.' One of the objects of the agreement was to prevent the unnecessary expenditure of capital in building a railroad for the benefit of one side, from Houston to Galveston, or for the benefit of the other, from the Junction to El Paso. To avoid that expense, the agreement provided for the joint use of the track from Houston to Galveston, and for the joint use of the track from the Junction to El Paso, the track of the latter belonging to the Galveston, Harrisburg and San Antonio Company, and the track of the former belonging to the Galveston, Houston and Henderson Railroad Company. The agreement further provides for the transfer by the Texas and Pacific Company to the Southern Pacific Companies, represented by Huntington, of the immense land grants which had been given by the United States to the Texas and Pacific Company. The Texas and Pacific Company also transferred all of its franchises west of El Paso to the Southern Pacific Companies represented by Huntington. It was in consideration of all these agreements and conveyances on the part of Mr. Gould and the Companies represented by him, that Mr. Huntington and the Companies represented by him agreed that the Texas and Pacific and the Southern Pacific Companies should be operated as one through continuous line to the Pacific Ocean, the earnings to be divided in proportion to the distance hauled by each party; that the arrangement for division of earnings, provided for in Article 6, was made; that the Louisiana Western Company was to use the Texas and Pacific track into New Orleans; that the parties agreed not to build competitive roads, or to duplicate the roads of each other, and that they also agreed not to purchase or control competing roads, and the clause in the 15th Article was inserted for the express purpose of avoiding the difficulty which would have arisen from the terms of the agreement but for that provision contained in that Article.

"The contract, as it stood, was a joint contract between all the parties, and no suit could have been brought upon the contract by any one company but for the provision contained in Article 15, which allowed one of the parties to maintain actions against any other, or against any or all of the railroad companies to protect any right secured by the agreement. But for that clause no such separate suit could have been brought.

"It is, therefore, manifest that the agreement is one, that there are a great variety of considerations enuring to the different companies, but they all constitute a part of one contract between Mr. Gould upon the one side, and Mr. Huntington upon the other.

"The unity of the contract being conceded, we have an averment in the petition on page 5 that 'in pursuance of said agreement, the same was duly made a decree of the Court in said litigation hereinbefore referred to, and in said Courts of Texas, New Mexico and Arizona, as by duly certified copies of said decrees will appear, and in form shown by the copy hereto annexed as part hereof, and marked Exhibit 'C,' which decrees conformed with and carried out said agreement.' Therefore the agreement has become *res adjudicata*, not only because it is by law in itself as a transaction *res adjudicata*, but because that transaction has been reduced to a judgment of Court, and that judgment cannot be impeached by either party collaterally. Therefore, even if the alleged illegality in the sixth clause of the agreement existed, the defendant is precluded by this judgment from availing himself of it. It is too late now for him to set up as a defense to the execution of the agreement a matter which should have been set up or could have been set up in the suit in which judgment on the agreement was rendered. It is well settled that a transaction or a judgment cannot be attacked collaterally, as was decided by the Supreme Court of the United States in the case of Attrill vs. Oglesby, 105 U. S. 605. Also in 16 An. 343; 11 An. 754, and Rabun vs. Pearson, 23 An. 696."

The fact that the Sixth Section of the agreement is entitled a "mutual agreement," has no force against our view. The considerations recited in the preamble consolidate into one unitary consideration the various matters recited, including the "mutual agreements" of the parties, and provides for one agreement on this basis.

So we assert that the Supreme Court of Louisiana gravely erred in its interpretation of these territorial decrees, as well as that of the Texas Court.

(2) The defendant asks this Court to affirm, on mere motion, the ruling of the Supreme Court of Louisiana, that the agreement sued on was null and void, as contrary to public policy. This is a very large question to be disposed of in so summary a way, but we will consider it as briefly as possible, premising that the defendant's exception concedes that the agreement was made in good faith, and alleges no fact concerning the premises.

The charter of the plaintiff Company set forth in the petition, cited in the agreement, put in evidence and referred to in argument, repeatedly, in the Courts below, provides, Transcript, p. 82:

"Sec. 4. That the said Texas and Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises and appurtenances of, and consolidate on such terms as may be agreed upon between the parties with any railroad company or companies heretofore chartered by congressional, State or territorial authority, on the route prescribed by the first section of this Act, but no such consolidation shall be with any competing through line of railroads to the Pacific Ocean.

"Sec. 5. That the said Company shall have power and authority *to make running arrangements with any railroad company or companies heretofore chartered, or that may hereafter be chartered by congressional, State or territorial authority;* also to purchase lands or to accept donations or grants of land or other property from States or individuals for the purpose of aiding in carrying out the object of this Company."

The Texas and Pacific acquired the Southern Transcontinental of Texas, and all its rights and powers, among which were the following:

"Sec. 3. And the said Company hereby incorporated may purchase the rights, franchises and property of the Memphis, El Paso and Pacific Railroad Company, heretofore incorporated by this State, and also the rights, franchises and property of any other company incorporated by this or any State, or by the United States or any territory, so that it may have its connection complete and continuous to the Atlantic on the east and the Pacific Ocean on the west." Tr. p. 108.

And this acquisition of all rights of the Transcontinental was approved and ratified by the Act of Congress of 1874, in express terms. Transcript, p. 90.

And under this power, so bestowed and ratified by Congress, the Texas and Pacific Railway Company in 1880 acquired the rights and property of the New Orleans Pacific Railway Company, as set forth in the petition, p. 1, and by the Act No. 14 of 1876 of the Legislature of Louisiana there pleaded, which is a public law, the Texas and Pacific has the following powers, among others:

"9th. To cross, intercept, join, and unite its railways, and pro-rate with any other railroad heretofore or hereafter constructed in the State of Louisiana, or any other State, at any point upon its route, and upon the ground of such other railroad, with the necessary turnouts, sidings, switches, and other conveyances [conveniences] in furtherance of the objects of its connections." Laws of Louisiana of 1876, p. 31.

And this acquisition is recognized in the agreement. Trans., p. 12.

Now we beg to ask what possible excuse is there for the statement by the Supreme Court of Louisiana that the agreement sued on is null and void? We assert that it was a good and praiseworthy agreement. In Woodstock vs. Extension Co., 129 U. S. 643, it was declared to be a duty of a railway company to save the burden on the public which would result from building unnecessary lines. One salient motive of the Gould-Huntington Agreement was to save a burden on the public by building unnecessary and duplicate lines between Galveston and Houston, and between Sierra Blanca and El Paso. This motive is commended as praiseworthy in the Woodstock case. The other facts of that decision have no likeness to those in question here.

A part of the Gould-Huntington Agreement is the division of earnings clause, section six as modified. The exception which alleges the general illegality of the agreement does not aver any fact to maintain such a charge. As we have repeatedly urged, it *does not allege any fact which goes to show that the agreement operates a restraint of trade, or a restraint of competition, or a fixing of prices, or rates, or raising of rates, or any other injury to the public, and much less are any of these things proved.*

The Louisiana Courts seem to have overlooked this point entirely. The cases cited from New York and Ohio, and from other States, are where rates or prices were fixed. The general doctrine of restraint of trade has been greatly modified. Kellogg vs. Larken, 3 Chandler (Wis.) 133; Diamond Match Co. vs. Roeber, 106 N. Y. 473: Oregon Co. vs. Winsor, 20 Wall. 64.

The effect of the agreement sued upon is not to stifle competition. It fixes no rates, it imposes no penalty, it appoints no governing body, it exercises no control by the parties on the one side over those on the other side. It is not a pool at all in any illegal sense; and the fact that it is called an agreement to pool does not change its intrinsic character.

If an agent of the Texas and Pacific Company in New Orleans wishes to get the business of a large mercantile firm here, he can charge a lower rate to El

Paso or San Francisco in order to induce such firm to give to the Texas and Pacific their other business to Dallas, Fort Worth or Marshall. See Map, p. 130. The argument of defendant that under this agreement to divide earnings only on certain traffic, both parties would become careless as to getting business, would seem to be absurd. The Court will take notice that there is much other business besides that included in the agreement, and there are other transcontinental lines. If both parties should neglect to get business, neither would get anything to divide.

The agreement evidently was intended to prevent the unnecessary expenditure of capital in the construction of duplicate roads from the Junction to El Paso, and from Houston to Galveston.

The quotations from the Code of Louisiana as to obligations without a cause, or with a false or illegal cause, are not in point. To apply them, the illegality must be first assumed, when it does not exist.

No court, either in this country or in Europe, has yet decided that such an agreement as that sued on is illegal upon the ground of public policy. On the contrary, the courts in England have sustained the validity of such an agreement or of an agreement infinitely more objectionable than the one sued on.

Mr. Hadley, in his valuable work on railroad transportation, shows, that even pools which fixed rates and might be considered much more objectionable than the agreement sued upon, are not only held not unlawful in England, but are considered legal in Belgium, where the Code Napoleon prevails, and where they have been made between roads belonging to the State, and those belonging to private corporations. See Hadley on Railroad Transportation, pages 81 and 216.

It seems from his statements at page 81, that the government of the German Empire also recognizes real pools as legal, where the civil law is the basis of jurisprudence.

The modern English and American cases are admirably summed up by Mr. Morawetz, in the 2d Edition of his work on Corporations, pp. 1130 and 1131. If what he says be true in regard to those agreements, which clearly show upon their face a restraint of competition, still more is it true in regard to the agreement sued upon in this case which fixes no rates, which defines no penalty, which appoints no board of control, which exercises no control by one party over the other, which is alleged in the exception of the defendant to have been made in good faith, which is not alleged as a matter of fact to have restricted competition, and which does not as a matter of fact restrict competition. The first exception, we repeat, avers no fact to show that the agreement sued on stifles competition. If it had, we could have tried the issue. We assert that if the case can be heard on the merits, we can show that it has not had this effect, but the contrary.

Having thus referred to the general purpose and scope of the agreement, sued on, we submit that it is simply a running arrangement made between Sierra Blanca and El Paso, between Galveston and Houston, between El Paso, Galveston and New Orleans; an arrangement to connect the Pacific with the Atlantic, or with the Gulf of Mexico, an arm of the latter, and to pro-rate. It is authorized by the legislation above quoted. Even if any of the plan is outside of the strict scope of the Acts above quoted, which we do not admit, it is germane and founded on the running arrangements, and the method of handling and prorating. It will assist the discussion to remember that to use a Gallic phrase "there are pools and pools." The word "pool" is frequently used by journalists, railroad men and by political orators in various senses. It is used in the sub-title of the Gould-Huntington Agreement, but it is manifestly used there as a mere matter of convenience, and forms no part of the language of the agreement itself or of the petition in this case. The only definition of the word "pool," by any lexicographer to which we have access, is in Webster's Dictionary, and is as follows: "A small collection of water; a deep collection of water supplied by a spring or occurring in the course of a stream; a small body of standing and even of stagnant water; a puddle." The definitions given by defendant are not correct so far as they apply to this case.

As the word is used sometimes there may be legal pools and there may be those that are illegal. The agreement we sue on is not a pool at all; and certainly not in any illegal sense.

Reference was made in brief of defendant in lower court to the monograph of the Hon. Thos. M. Cooley, on "Popular and Legal Views of Traffic Pooling," first published in the *Railway Review* of April 26, 1884, and republished January 8, 1867. An examination of Judge Cooley's monograph confirms very strongly the views which we have submitted.

In the first place the kind of pools which the learned author is discussing are manifestly those by which rates or prices are fixed. For he says, after showing that they are legal in England:

"In this country the method of pooling seems to be for the several contracting parties to create some common authority upon which will be conferred the power to *establish and change rates for the transportation of property within a certain territory, or over a certain line, and also to apportion the business between them.* The apportionment will be made upon a consideration of what the companies severally would be likely to obtain under the operation of free competition, and it will be changed from time to time if found to be relatively unjust."

Referring to many of the cases which were cited by our learned opponents, Judge Cooley says: "It would be easy to show that many of these cases have no important bearing upon the question of the legality of railroad pools," and intimates quite strongly his own opinion that even such pooling arrangements as he is discussing ought to be declared legal, though, of course, he cannot undertake to affirm as a prophet that they will be. They have, at least, been declared lawful in England, and they have not been declared unlawful in this country.

Now, we submit with great confidence, that if Judge Cooley, writing impartially and under the sanction of a great repute, has these views of a pool which fixes prices or rates, he would certainly and *a fortiori* say of the running arrangements and division of partial earnings involved in the case at bar, where no rates or prices are fixed, that they are not unlawful.

We may also note that Judge Cooley questions the wisdom of the New York cases on which the defendant at bar so greatly relies (4 and 5 Denio), and points out how vigorously they have been combatted by the Supreme Court of Wisconsin in Kellogg vs. Larkin, 3d Chandler, 133, 159, to which we refer. See also Diamond Match Co. vs. Roeber, 106 N. Y. 473.

We have referred to Mr. Hadley's valuable work on Railroad Transportation. He is an expert, is Labor Commissioner of Connecticut. He writes of pools very much as Judge Cooley does. When he speaks of those which have been criticised by some writers, though never by the courts, as possibly contrary to public policy, he is speaking of those which *fix rates*, p. 77. He shows that even these are held not unlawful in England, and that they are considered legal in Belgium, where the Code Napoleon prevails, and where they have been made by contract between the roads belonging to the State and those belonging to private corporations, pp. 81, 216. He cites the latest cases, and among them the decision of Mr. Justice MATTHEWS, to which we will soon refer.

We submit with great earnestness that all presumptions are in favor of right doing and the liberty of contract. The freedom to make agreements is an important part of that civil liberty of which we boast, and of which we ought not to be deprived by any subtlety of interpretation, and especially in the instant case.

In Richardson vs. Melor, 2 Bingham, 252, Mr. Justice BURROUGHS says: "Public policy is an unruly horse, and when you once get astride of it you never know where it will carry you."

In the same case Chief Justice BEST said:

> "I am not much disposed to yield to the argument of public policy. * * * I admit that if it can be clearly put upon the contravention of public policy the plaintiff cannot succeed; *but it must be unquestionable; there must be no doubt about it.*"

In the case of Printing Co. vs. Sampson, L. R. 19 Eq. 462, Sir George Jessell, Master of the Rolls, said:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, *shall be enforced by courts of*

justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract."

We submit that the principle of these remarks applies to our case. The agreement we sue on was made by intelligent people, in the exercise of that freedom of contract which ought to be the right of every American. It was made under federal authority. The agreement ought not to be adjudged to violate the rule of public policy, unless it plainly and unquestionably does so violate that rule. We should not be condemned on surmise and inference and fine-spun theories.

The case of Central Trust Co., vs. The Ohio Central, 23 Fed. Rep. 306, was decided by Justice MATTHEWS. The contract in that case was a real pooling contract by which *prices were fixed,* and might have been considered subject to many objections which cannot be raised against the agreement sued upon in the case at bar. The Court said in that case that the contract itself was a customary one among railroads and the receiver believed it to be reasonable and fair, and that it was expedient to continue it in force, *and he was required to account under it.* It is enough to say at present that in the opinion of Mr. Justice MATTHEWS, that contract was not contrary to public policy. *A fortiori* the agreement which we sue upon is not.

We also refer as we did in the lower court to the following English cases:

Case of Shrewsbury Railroad, 2 McN. & G., 305; same contract, 17 Adolphus & Ellis, 652, 79 E. C., L. R.; Howe vs. the London Railway; 2 Johnson & Henning, 102; Hare vs. Same, *Id.*, 216; Collins vs. Socks, 4 Appeal Cases, 685; Mogue Steamship Co. vs. Macgregor, 21, 2 B. Div., 544.

Also to Diamond Match Case, 106 N. Y. 481; Leslie vs. Lorillard, 110 N. Y. 519; Shade Roller Co. vs. Cushman, 143 Mass. 364.

It may be added that our view, that the agreement sued upon is not a pooling contract in the sense in which that term is frequently employed to indicate something which invades public policy and fixes rates or prices in such a way as to oppress the public, but is only an agreement for running arrangements with a partial division of certain earnings at certain points, finds great confirmation in Section 5 of the Interstate Commerce Law, Acts of 1887, Chap. 104. That Section has two prohibitions, and creates two offenses. The one prohibition is against pooling of freights of different and competing railroads; the second is against the division between them of aggregate or net proceeds or earnings, or any portion thereof; and the provision that each day of continuance shall be deemed a separate offense applies only to the *pooling of freights*, and not to a mere division of earnings. This language is intended to have some meaning and was framed after great investigation and debate, and is in direct confirmation of our views, that the agreement sued upon is not what is generally called a pooling agreement, and not what is so called in that Section of the Interstate Commerce Law; but belongs to the second class of agreements mentioned in that Section, namely, a mere division of certain earnings.

Nay, more—it is a running arrangement authorized and made long before the Interstate Commerce Law was passed, and the division of certain earnings is only a part of the plan. One party to the agreement controlled the Galveston, Houston and Henderson, from Galveston to Houston—the other the line from Sierra Blanca to El Paso. See Map in Transcript. Each is to use the other's said line, and certain earnings, as part of the plan, are to be pro-rated.

When such an arrangement is made in admitted good faith, when it is authorized by Congress, when it is made and sued upon by a plaintiff Company created by Congress, and whose every doing is a Federal act; when it saves unnecessary railroad building and unnecessary charges on the public; when it concerns mainly Interstate Commerce; when the plaintiff *was obliged to go into the State Court*, because it was advised that under the Judiciary Act of 1887, the United States Circuit Court for the Fifth Circuit had no jurisdiction;—it seems manifest that the motion to affirm should be denied.

The defendant in error asks your Honors to affirm the judgment on mere motion, because the writ of error was taken "for delay." This is the first time we have ever heard of a defendant in the cause, against whom no judgment has been rendered and who is simply retaining large sums admitted to be due in the business sense, complaining of delay. It also asks that the judgment be affirmed "because the questions on which the jurisdiction depends are so frivolous as not to need further argument." And then it argues part of them for nine printed pages.

We submit that the questions are not frivolous. They are very weighty. They cannot be disposed of by calling the agreement an "illegal pool." It is an important agreement made on vast considerations admitted to have been received, and to be now enjoyed by the defendant. It is an agreement which does not and cannot harm the public and benefits it. It saves the building of many miles of railroad from Sierra Blanca to El Paso, and from Houston to Galveston, provides for important running arrangements with fair prorates. It involves no consolidation or control, it forms no partnership, it fixes no rates, it raises no rates, it does not stifle competition. The defendant is trying to enrich itself at our expense, and it is elementary and axiomatic, that no man should enrich himself at the expense of another.

We ask that the motions be denied.

W. W. HOWE,
For Plaintiff in Error.

OCTOBER 7th, 1890.

Jno. F. Dillon
of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1210.

THE TEXAS AND PACIFIC RAILWAY COMPANY

versus

THE SOUTHERN PACIFIC COMPANY.

PETITION FOR A REHEARING.

W. W. HOWE.
JOHN F. DILLON,
For Petitioners.

T. H. Thomason, Print, 33 Natchez St., N. O.

SUPREME COURT OF THE UNITED STATES.

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THE TEXAS AND PACIFIC RAILWAY COMPANY

versus

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PETITION FOR A REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The plaintiff in error, the Texas and Pacific Railway Company, respectfully prays for a rehearing of the motion to dismiss or affirm in this cause.

The Court has denied the motion to dismiss, but has held that the only federal question presented was with respect to the decrees of the Courts of the Territories and of Texas. Your Honors have decided that the right conferred on the plaintiff by its federal charters to make the agreement sued on, and the right to do so in interstate commerce without State restriction, was not so set up and claimed as to require a decision here. And in reaching this conclusion your Honors have held that the decision in Stewart vs. Kahn, 11 Wallace, 493, does not apply in our favor, and in the opinion it is said of Stewart vs. Kahn:

"*The petition referred to there seems to have been simply one for review on appeal, and not a petition filed after the case had been decided by the Supreme Court, and the record showed the decision of the federal question by both tribunals.*"

It is submitted with great deference, but with equal earnestness, that your Honors have been led into error in this regard by the mistakes of Mr. Wallace in his head note and in his statement of facts in this case of Stewart vs. Kahn. The head note uses the phrase "petition for review," and the reporter, at foot of p. 494, and head of p. 495, says:

"The Court in which the suit was brought gave judgment for the defendants. The plaintiffs then filed a petition in the Supreme Court of Louisiana for a rehearing of the case."

In the use of the phrase "petition for review," and in the statement above quoted, which would lead a reader to suppose that immediately on judgment being given by the lower court of Louisiana, a petition for review was filed in the appellate court, the reporter simply made two mistakes. There are no methods of procedure in Louisiana, except those detailed in her Code of Practice. There is no such thing in Louisiana practice as a petition for review, or petition of review, or petition for review on appeal, or otherwise.

Nor in the case of Stewart vs. Kahn was there any petition for review on appeal. Nor did the plaintiffs in that case, on being cast in the lower court, proceed in the Supreme Court of Louisiana by filing a petition for a rehearing of the case, in the method and at the time intimated by the reporter.

The errors of the reporter have misled your Honors and you have declared that the petition for rehearing in Stewart vs. Kahn was "simply one for review on appeal and *not a petition filed after the case had been decided by the Supreme Court;* and the record showed the decision of the federal question by *both* tribunals," [of Louisiana].

It is repectfully prayed that your Honors will examine the transcript of Stewart vs. Kahn, on file in the clerk's office in this Court. We have examined the record here and in Washington. 81, Dec. Term 1870.

The case went up from Louisiana, and was reversed on the sole ground of the Act of Congress of June 11, 1864, concerning limitations of actions or suspension of prescription, 13 Stat. at Large, p. 123. And this Court said, 11 Wall. p. 503, of the controversy, "its determination therefore depends necessarily upon the construction and effect to be given to the Act of 1864."

And it had already been remarked that "apart from the Act of 1864, it would present no ground of federal jurisdiction."

The suit was begun in the Fourth District Court of New Orleans on a promissory note and a small balance of account pp. 1 & 2 and defended by a general denial and a plea of prescription of five years, p. 17.

The Act of Congress was not alluded to in any way by either party.

On the 4th June, 1866, judgment was rendered by the court of first instance in favor of defendants, and for costs, against the plaintiffs, without allusion to the question of prescription and, of course, without any reference to the Act of Congress. 9

On June 5, 1866, plaintiffs filed a motion for a new trial, which made no reference to the Act of Congress and inferentially declined to assert any right under it, either because they did know of it, or because they supposed that the Act of June 11, 1864, was meant to apply only to proceedings in Courts of the United States. The motion for a new trial simply referred to a supposed principle of general law or jurisprudence that "the pendency of war suspended the operation of the law relating to prescription." p. 9

New trial being refused, p. ~~21~~ 10, the plaintiffs appealed to the Supreme Court of Louisiana, and on the *19th day of April, 1869*, that tribunal delivered an opinion affirming the judgment on the ground of prescription, but without any reference to the Act of Congress of June 11, 1864; p. ~~43~~. 14

Thereupon, before this opinion could mature into a final decree, and *on the 28th day of April, 1869*, nine days after the decision was pronounced, the plaintiffs filed their *petition for a rehearing*, p. ~~43~~. 15 This was the pleading which your Honors, misled by the mistakes of the reporter, have declared "was *not* a petition filed after the case had been decided by the Supreme Court" of Louisiana.

Plainly it was filed after opinion delivered on the 19th of April, 1869, but before finality of judgment. The Supreme Court of Louisiana could still pass on the federal question set up by it. It did pass on it, and on the 10th May, 1869, refused the application, p. 45. It gave no reasons, but none the less it considered the federal question for twelve days, and denied the federal right so asserted, *and which was not otherwise pleaded in the record.*

It is true that there was a brief of argument filed in the case before the first opinion of the Supreme Court of Louisiana was delivered, and apparently on the 1st April, 1869, in which the Act of Congress of June 11, 1864, is referred to, p. 13 but this is not a pleading, and is no part of the record. This has been often decided by our Supreme Court. In the case of Chase vs. Davis, 20 La. An. 201, for example, it was pointed out that a brief is only "a written argument," makes no part of the pleadings, and is not a part of the record, and cannot be used to set up a defense, or a claim.

It is submitted, as demonstrated, that, by the unfortunate mistakes of the reporter, your Honors have been misled as to the facts in Stewart vs. Kahn, and as to the conclusions to be drawn from the opinion in that cause. There was no petition for review on appeal in that case; the petition was for a rehearing, and was filed after the first opinion had been pronounced by the Supreme Court of Louisiana; and the Act of Congress in question was not even remotely alluded to in, or perhaps known to exist by, the lower State court, or by any party there; and had not been pleaded in the upper Court.

The petition for rehearing in that case, which as we have seen for the first time pleaded on the record the Act of Congress, was the regular petition for rehearing, a pleading provided by the Code of Practice, Arts. 912, 913, in the Supreme Court of Louisiana, filed after opinion delivered, but before the finality of the judgment. The Supreme Court of Louisiana passed on it, and of course passed on the rights and immunities specially set up and claimed by it, and on May 10th, 1869, simply refused its prayer, and therefore denied such rights and immunities. And this Court, on writ of error, held as follows, 11th Wallace, p. 502:

* * "Enough is shown to develop clearly the action *of the Supreme Court of the State*, and the point we are called upon to review.

"There is no controversy as to the facts. Under the circumstances, a refusal on our part to exercise the jurisdiction invoked would involve a sacrifice of substance to form and unwarrantably defeat the ends of justice."

In other words, in Stewart vs. Kahn, this Court reversed the judgment of the Louisiana Supreme Court by virtue of a right and immunity under the Act of Congress of June 11th, 1864, which was for the first time pleaded by the petition for a rehearing of April 28th, 1869, addressed to an opinion theretofore pronounced of April 19th, 1869.

It is further submitted that in the case of Stewart vs. Kahn, as in the case at bar, the opinion and judgment of the Supreme Court of Louisiana not becoming final during the pendency of the application for rehearing, Code of Practice, Art. 913, the plaintiffs could not have taken a writ of error until the Supreme Court of Louisiana had considered and refused the application.

Up to May 10th, 1869, there was no final judgment of the highest State Court to which a writ would lie, nor was there any judgment that could be executed or recorded or enforced in any way. When the Court finished its deliberations and passed on the question, presented by the petition, then, and not till then, could the writ of error lie. And when it was sued out, it took up for review a judgment that became *final* on the 10th May, 1869, and wherein, by that petition for rehearing alone, as matter of pleading, a right, privilege or immunity under a Statute of the United States was claimed.

The case at bar is much stronger for the plaintiff in error than Stewart vs. Kahn.

The plaintiff at bar specially set up the federal statutes by which it lives and moves and has its being, and by virtue of which alone it has power to contract, and other charters acquired thereunder and ratified by Act of Congress. It set forth *as part of its petition* an agreement, in which the parties on both sides recite the federal charters and the federal rights of plaintiff, and the interstate character of the larger part of the business dealt with, and *inter alia*, declare, transcript, p. 15:

"*And whereas, the Texas and Pacific Railway Company is entitled by its charter to make running arrangements with any other railroad company or companies.*"

And the agreement, part of the petition, also recites and admits the acquisition of the rights of the New Orleans Pacific Railway Company, under federal authority, p. 12.

The federal power to make the agreement and to make it in reference to interstate commerce was thus recited and claimed. No special form of words was sacramental in order to make such claim. It inhered in the cause. Miller vs. Nichols, 4 Wheaton, 311; Davis vs. Packard, 6 Peters, 41; Minnesota vs.

Bachelder, 1 Wall. 109; Dooley vs. Smith, 13 Wall. 604. Federal power to make the agreement was claimed and the question was in the case from the beginning.

And on the hearing of the exceptions or demurrers, which set up, as *antagonistic* to these federal rights and immunities, matters of State regulation and jurisprudence, the federal statutes are all specially offered and received in evidence, pp. 80 *et seq*. Here was a distinct issue of federal right, privilege and immunity on one side and State antagonism thereto on the other, and of course it was discussed. The lower Judge held the agreement sued on to be contrary to the Constitution of Texas of 1876, and on the motion for a new trial, pending which his judgment could not take any effect (La. Code of Practice, Arts. 546, 558), the plaintiff urged on the record as against the decision the interstate character of the commerce, *which had been averred by defendant also, in its third exception*,—and also set up as against the defense under the Texas Constitution "the rights conferred by Congress on the plaintiff Company." Transcript, p. 77.

The new trial being refused, the case went to the Supreme Court of Louisiana. The assignment of errors there reiterated the claims of the plaintiff under the federal charters, recited the incorporation of the plaintiff by the Acts of 1871 and other Acts prior to 1876, and urged the rights, privileges and immunities of plaintiff under the federal power to regulate commerce and establish post roads, p. 131; and this with respect to interstate commerce and as against State jurisprudence, laws, regulation or control. See assignments 6 and 7, p. 131.

The questions were all argued in the Supreme Court of Louisiana, as the printed briefs would show; and the Court having delivered the opinion found at p. 133 *et seq.*, taking a ground to which the learned Judge below had attached no importance, the plaintiff put in its petition November 23, 1889, for rehearing, found at p. 145 *et seq*; reiterating and presenting again in that condensed form the three federal questions which had been fought over in some days of discussion and hundreds of pages of briefs.

This petition is a *pleading*, and the only one provided by Louisiana practice in such a case for a *plaintiff* after his original declaration or petition. As noticed in Stewart vs. Kahn, 11 Wall. 494, there is in Louisiana no replication or rejoinder. Code of Practice, Art. 329. Nor is there in Louisiana any such thing as a bill of exception to a judgment of the lower court. Goodwin vs. Chesneau, 3 Martin N. S. 412.

The whole case was still in a condition to be decided. There was no final judgment, and could be none at that time, and the Supreme Court of Louisiana considered the points made more than a month, p. 152, and refused the rehearing Dec. 31, 1889, and then its judgment became final, and not till then. See Appendix.

It is true, as stated in your Honor's opinion, that new questions are not as a rule to be set up in the Supreme Court of Louisiana by such a petition. That custom is in our favor. If we had made points in the petition for a rehearing which had not been urged before the Court, the Court *would have said so*, and would have refused the relief prayed on that ground, as in the cases your Honors have cited, such as Rightor vs. Phelps, 1 Robinson, 330. But it did not refuse a rehearing on that ground. *It denied the rights claimed in the petition:* and then, and not till then, its judgment became final. And in this state of things the judgment thus becoming final was brought hither. *It could not have been brought hither until the petition for rehearing was considered and refused*, for up to that time, namely, up to December 31st, 1889, there was no final judgment of the highest State Court to which the writ of error could apply. And when our writ of error was sued out, it brought up a judgment which became final only on December 31, 1889, with all the pleadings and claims of right which lay behind it. This consideration, it is submitted, is conclusive in our favor.

It will be no hardship on defendant to have these federal questions argued orally and in due course.

The plaintiff in error therefore respectfully prays that there be a rehearing of the motion to dismiss or affirm in this cause, and that such other relief may be granted as may be just.

W. W. HOWE,
JOHN F. DILLON,
Julian S Blair *For Petitioners.*

I certify that, in my opinion, the above petition is proper to be filed.

W. W. HOWE.

APPENDIX.

ACT 94 OF 1858 OF GENERAL ASSEMBLY OF LOUISIANA, ACTS OF 1858, p. 65.

AN ACT

Relative to final judgment on appeal in the Supreme Court at New Orleans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That from and after the passage of this act, judgments rendered by the Supreme Court of New Orleans *shall be final*, and the Clerk shall deliver a copy to every person requiring it, *after six judicial days shall have elapsed from the rendering of the judgment*, and that the parties shall have a right, at any time within said delay, to apply for a rehearing according to existing laws.

SECTION 2. *Be it further enacted, etc.*, That the foregoing section shall be in force from and after its passage, any law to the contrary nothwithstanding.

CODE OF PRACTICE.

ART. 911. The judgments rendered by the Supreme Court at New Orleans *shall be final*, and the Clerk shall deliver a copy to every person requiring it, *after six judicial days shall have elapsed from the rendering of the judgment*, and that the parties shall have a right, at any time within said delay, to apply for a rehearing according to existing laws.

Art. 912. In the interval between the day on which the judgment is rendered, and that on which it becomes final, a party dissatisfied with the judgment may apply to the Court for a new hearing in the cause, and for this purpose shall present a *petition*, in which he shall state substantially the reasons for which he thinks the judgment erroneous, and shall cite the authorities in support of his opinion.

Art. 913. The Court *shall consider of the reasons* adduced in such petition, without argument, and, if it grants a new hearing of the cause, shall state the points on which it wishes to hear the parties anew.

While the Court is deliberating on this application, the three [now six] days allowed for rendering a judgment *final* do not run.

Office Supreme Court, U. S.
FILED
SEP 29 1890
[illegible] McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1210.

THE TEXAS AND PACIFIC RAILWAY COMPANY

versus

THE SOUTHERN PACIFIC COMPANY.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR AND TO AFFIRM.

HENRY J. LEOVY,
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T. H. Thomason, Printer, 36 Natchez Street.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1210.

THE TEXAS AND PACIFIC RAILWAY COMPANY

versus

THE SOUTHERN PACIFIC COMPANY.

MOTION TO DISMISS AND ALSO TO AFFIRM.

And now into this Honorable Court, by its undersigned counsel, comes the Southern Pacific Company, defendant in error, and moves the Court to dismiss the writ of error sued out herein by the plaintiff in error, the Texas and Pacific Railway Company (which was plaintiff in the State Court), on the following grounds, to-wit:

First. Because the decision of the Supreme Court of Louisiana in this case was not against the validity of any treaty or statute of, or authority exercised under, the United States drawn in question nor was it in favor of the validity of a statute of, or an authority exercised under, the State of Louisiana drawn in question, as being repugnant to the Constitution, treaties, or laws of the United States, nor was it against any title, right, privilege, or exemption specially set up or claimed under any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States.

Second. Because the Supreme Court of Louisiana decided in this cause that the contract sued on was illegal upon the general principles by which a court determines whether a transaction is good or bad on principles of public policy, and did not have to pass upon the validity of, or construe, the Constitution, or any treaty, or statute, of the United States or of any State.

Third. Because there is no federal question presented in or by the case which ought to have been passed upon by the Supreme Court of Louisiana in the regular course of its proceedings.

Wherefore, the said defendant in error prays that the writ of error herein may be dismissed.

And under rule 6 of this Court the defendant in error further prays—in case the writ of error be not dismissed:

First. That the judgment of the Supreme Court of Louisiana be affirmed on the ground that it is manifest that the writ of error was taken for delay only.

Second. That said judgment be affirmed on the ground that the questions on which jurisdiction is claimed by plaintiff in error are so frivolous as not to need further argument.

Third. That this said judgment be affirmed because its correctness is so clearly manifest as not to require argument.

HENRY J. LEOVY,
JOSEPH PAXTON BLAIR,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1210.

THE TEXAS AND PACIFIC RAILWAY COMPANY

versus

THE SOUTHERN PACIFIC COMPANY.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR AND TO AFFIRM.

STATEMENT OF THE CASE.

The object of this suit is to enforce the specific performance of an agreement to pool earnings from competitive business made between rival and competing railroad companies, and to recover pool balances alleged to be due under the agreement. The defense which prevailed in the Supreme Court of Louisiana, and which afforded the sole and sufficient ground for the judgment of that Court, was the illegality of the pooling contract upon general principles of law and public policy. The plaintiff in error, however, claims that numerous federal questions are raised by the pleadings and are involved in the judgment which it seeks to have reviewed. The defendant in error contends that the federal questions urged in support of the jurisdiction were either not raised by the pleadings in the lower court or were not actually decided or necessarily involved in the judgment of the State Supreme Court.

An analysis of the pleadings and of the agreement, annexed to the petition, which contains the pooling contract sued on along with a number of other distinct and independent contracts, will make clear the nature of this suit and, in our opinion, establish the correctness of the grounds upon which this motion is based.

The petition begins thus: "The petition of the Texas and Pacific Railway Company, a corporation created by and under the laws of the United States, to-wit., under the Act of Congress, approved March 3, 1871, chap. 122; Act approved May 2, 1872, chap. 232; Act approved March 3, 1873, chap. 257, and Act approved June 22, 1874, chap. 406, of 1874; and which corporation has certain rights, property, powers, privileges and franchises by the consolidation with it of the Southern Pacific Railroad Company, of Texas, and the Southern Transcontinental Railway Company, of Texas, recognized, affirmed and approved by said Act of Congress of June 22, 1874; and which corporation has also acquired by deed of consolidation of June 20, 1881, the railway and railway franchises of the New Orleans Pacific Railway Company, a corporation created by the Act of the General Assembly of the State of Louisiana, No. 14, of 1876, being the consolidation referred to and recognized in the 7th Article of the agreement 'A' hereinafter set forth; and which petitioner is herein represented by John C. Brown, now sole Receiver of its property, appointed as such by the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, in the cause entitled the Missouri Pacific Railway Company vs. The Texas and Pacific Railway Company, No. 11,181, of the docket of said last named Court, and in ancillary proceedings and suits of foreclosure in said U. S. Circuit Court throughout Louisiana and Texas, and the said John C. Brown, Receiver, joining herein as petitioner, respectfully shows:"

During the pendency of the suit the Receiver was discharged and afterwards died. On suggesting these facts, the cause was ordered to be proceeded with in the name of the Texas and Pacific Railroad Company as sole plaintiff. The receivership, therefore, has nothing to do with the case. The clause, quoted above, contains the only reference in the pleadings to the Acts of Congress or of the State of Texas by which the plaintiff was created and granted its corporate rights. The Court will observe that the terms of these Statutes are not stated, and that, except perhaps the right to corporate existence, no title, right, privilege or immunity is specially set up or claimed under them.

The petition next states that the plaintiff has offices in Texas and at New Orleans and that its lines of railway extend or reach by track, running arrangements, or connections, from El Paso, Texas, to New Orleans, in Louisiana, and to Galveston, in Texas.

It is then alleged that on November 26, 1881, Collis P. Huntington, of New York, on behalf of himself and his associates and on behalf of certain enumerated railroad corporations, entered into an agreement with Jay Gould, of New York, on behalf of himself and his associates and on behalf of certain named railroad corporations, a copy of which agreement was annexed to the petition and made part thereof as Exhibit "A;" that thereafter, about February 18, 1885, this agreement was amended by a modification, which was annexed and made part of the petition as Exhibit "B."

The petition then declares what (in the opinion of the plaintiff) the agreement shows on its face were the considerations which passed between the parties to it, namely: the settlement of pending litigation, the release and relinquishment of certain disputed rights and franchises of plaintiff west of El Paso, and the construction of its track to make a junction with the other railroads at a certain point east of El Paso. It is stated that, as provided by the agreement, the same and its modifications have been duly adopted and ratified by the several corporations mentioned as parties therein and the ratifications exchanged, and that the personal undertakings of said Huntington and Gould in the premises have ceased. The full compliance by the plaintiff with all its obligations under the agreement is alleged.

The petition next contains this clause: "That in pursuance of said agreement the same was duly made a decree of the Court in the said litigation hereinbefore referred to and in said Courts of Texas, New Mexico and Arizona, as by duly certified copies of said decrees will appear and in the form shown by the copy hereto annexed as part hereof and marked Exhibit "C," which decrees conformed with and carried out said agreement."

No certified copies of any decrees of court were annexed to the petition or offered in evidence. The Exhibit "C" is an uncertified copy of what purports to have been a decree in a suit in a district court of New Mexico between the Texas and Pacific Railway Company, plaintiff, and the Southern Pacific Railroad Companies, of New Mexico, Arizona and California, The Los Angeles and San Diego Railroad Company, and the Central Pacific Railroad Company, defendants. This decree will be discussed hereafter and its connection, or rather want of connection, with the instant case will be pointed out. It is sufficient for the present to say that it appears to be a consent decree, rendered at the solicitation of the parties thereto, which makes the agreement between Mr. Huntington and Mr. Gould a part of the decree so far as the agreement affects the parties to that suit and the matters at issue between them, but declares that it is not intended to otherwise affect or interfere with the agreement

None of the defendant companies in that suit were parties to the contract now sued on. We call attention to the fact that no rights are specially set up or claimed under this decree. It is not alleged, and it is not the fact, that either the Southern Pacific Company, defendant in error, or any of the railroad corporations mentioned in the Gould-Huntington Agreement as parties to the pooling contract now sued on, were parties to the suit in which the aforesaid decree was rendered. It is not alleged, and it is not the fact, that the matters at issue in the suit in New Mexico had any necessary connection with the pooling contract or with any claims of the plaintiff for pool balances, which it is the sole object of this suit to recover.

The petition then sets forth the pooling contract contained in the said agreement. The parties to the pool are, on one side, the Texas and Pacific Railway Company and its connections in the transportation of freight or passengers between El Paso and Galveston and between El Paso and New Orleans, and, on the other side, the Galveston, Harrisburg and San Antonio Railway Company and its connections engaged in the carriage of traffic between the points named. The terms of the contract, after its modification in 1885, provide for the division of earnings between the two sides, those from traffic between New Orleans and El Paso equally, and those from traffic between El Paso and Galveston in the proportion of one-third to the Texas and Pacific Railway Company and its connections, and two-thirds to the Galveston, Harrisburg and San Antonio Railway Company and its connections.

It is next alleged that the Southern Pacific Company, made defendant in the suit, a corporation created and organized under the laws of Kentucky, took possession and control, about November, 1884, of the railroad companies mentioned in the agreement as represented by Mr. Huntington, and became subject to the rights and obligations of the agreement for division of earnings; that it rendered some accounts under this agreement, the correctness of which is disputed, but finally failed and refused to pay the sums alleged to be due thereunder to plaintiff; that plaintiff is entitled to an accounting and to a decree against the defendant for the amounts which will thus appear to be due under the pooling contract.

A reference is then made to Article XV of the Gould-Huntington Agreement, which provides that either or any of the several railroad companies, parties thereto, may maintain any action either at law or in equity against either, any, or all of the other railroad companies, parties to the agreement, to protect any right secured by the agreement, to specifically enforce the same, or to recover damages for the breach of any stipulation in the agreement affecting its interest, and that no objection shall be had or taken to any such action by reason of non-joinder of parties as plaintiffs and all clauses shall be so construed as to secure this right.

There is in the petition a vague and indefinite claim for a comparatively small sum on account of "Equalization of rates in New Mexico and Arizona business." It was treated as of the same character as the pool balances and does not require special notice.

After reserving "further demands accruing to petitioners under said agreement," the petition closes with a prayer for a judgment against the Southern Pacific Company for $352,717.78, the amount alleged to be due under the pooling contract up to March 31, 1887, and the further sum of $200,000, or such other sum as may be found due upon an accounting from March 31, 1887, to, presumably, the date of the accounting, with interest on monthly balances found due month by month from November 1, 1884; and for the further sum of $5859.49.

We have made the foregoing full analysis of the petition in order to show that the plaintiff did not therein draw in question the validity of any statute of or authority exercised under the United States, or of any State law or authority on account of repugnancy to the Constitution, statutes, or treaties of the United States, and did not therein specially set up or claim any title, right, privilege, or immunity under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States. It did not specially set up or claim that the pooling agreement sued on was authorized by any law of the United States, or that its validity had been finally adjudged in any previous suit in a federal court between the parties to the present controversy.

To this petition the defendant filed certain peremptory exceptions, or, in common law parlance, pleas in bar. These exceptions presented three distinct and independent defenses: 1, That the Gould-Huntington Agreement and its modification contained a number of separate, distinct and independent contracts with independent objects and considerations and different obligors and obligees; that the contract to pool earnings contained in Subdivision VI of said agreement, which said pooling contract plaintiff sought to enforce, was a contract complete in itself, having as its sole consideration the undertakings which the parties thereto mutually assumed in said subdivision and its modification; that said pooling contract was contrary to public policy, illegal and null and did not confer, and was incapable of conferring, upon any of the parties to it any rights which the Court could recognize or enforce; 2, That the contract sought to be enforced contravened a clause in the Constitution of Texas in force at the time it was entered into, prohibiting the consolidation, etc., of rival and competing lines of railway in Texas; that as it must be performed, if at all, almost entirely within the State of Texas and by Texas corporations it was null and void *ab initio;* 3, That if the pooling agreement sued on ever had any valid existence, it was terminated by the Interstate Commerce Act, which positively prohibited any arrangements between competing railroad companies for a division of their earnings, and declared the same to be an offense and a misdemeanor.

The Supreme Court of Louisiana confined its attention to the first of these defenses, and, considering that the pooling contract sued on was illegal and null upon general principles of law and public policy, gave judgment in favor of defendant dismissing the suit. The Court in its opinion expressly declared that it did not find it necessary to pass upon the defenses based upon the Constitution of Texas, and the Interstate Commerce Act. The illegality of the contract sued on is manifestly sufficient to support the judgment, and, hence, whatever federal questions may have been involved in the second and third defenses, they cannot be urged to sustain this writ of error.

Upon these pleadings, petition and exceptions, the case went to trial. Witnesses were examined *pro* and *con* as to the relative position of the railroad companies that were parties to the pooling agreement, the defendant endeavoring to prove that they were parallel and competing lines within the meaning of the prohibitory clause in the Constitution of Texas, and the plaintiff endeavoring to show the contrary. Evidence was also adduced to prove the injury to the public from the pool by showing that the parties thereto were each the other's sole competitor. The defendant introduced in evidence the acts of incorporation of the Southern Pacific Company, defendant, and of the various companies which were parties to the pooling contract and were represented at that time by Mr. Huntington. The plaintiff offered in evidence the various Acts of Congress and of the

State of Texas referred to in the opening clause of the petition quoted above. The evidence was then closed. The Court will search the record in vain for anything in the offers of evidence or objections and exceptions thereto which raised or seems intended to raise any federal question.

The case being submitted, the Judge of the lower court rendered judgment in favor of the defendant dismissing the suit, indicating in a three line decision that the conclusion reached was based upon a consideration of the Constitution of Texas.

A new trial was asked for upon the following grounds: 1, Because the judgment was contrary to the law and the evidence; 2, Because the agreement sued on did not conflict in any way with the Constitution of Texas; 3, Because the prohibitory clause in the Constitution of Texas, as construed by the Court, constituted an interference with interstate commerce, and thus violated the commerce clause of the Constitution of the United States; 4, Because the said clause in the Constitution of Texas, as construed and applied by the Court, impaired the contract rights of plaintiff conferred by Congress and the State of Texas, and, hence, violated Article 1, section 10, paragraph 1, of the Constitution of the United States; 5, Because the agreement was made in good faith for great considerations, had been acknowledged by defendant, and had not been objected to by the State of Texas; 6, Because, since the judgment complained of, the Supreme Court of Texas had construed the State Constitution in a manner which mover thought was favorable to its contentions.

We do not admit that federal questions presented for the first time in a motion for a new trial are raised at a proper time or in a proper way. We shall discuss this hereafter. We desire now to call the Court's attention to the fact that the federal questions raised in this motion relate exclusively to the defense founded on the Constitution of Texas. As the Supreme Court of

Louisiana expressly based its decision on another and a distinct and independent defense, and did not construe or apply the Constitution of the State of Texas, none of the federal questions suggested in the motion for a new trial, even if properly raised, have anything to do with the decision to which the writ of error herein is directed, and cannot be urged in support of the jurisdiction of this Court. The grounds upon which the District State Court rested its decision are immaterial. 120 U. S. p. 146.

The new trial was refused and plaintiff appealed to the Supreme Court of the State.

On filing in the Supreme Court the record, which consists of a transcript of all the proceedings, pleadings, evidence, etc., in the Court below, the plaintiff and appellant filed what it styled an assignment of errors. No law or rule of practice in Louisiana requires ~~or authorizes~~ the filing of such a document in the event of an appeal to the Supreme Court. Plaintiff doubtless intended in this way to supply its failure to specially set up or claim any title, right, etc., under a law of or authority exercised under the United States. An examination of the assignment of errors, however, will show that it raises the same points which were raised in the motion for a new trial and which were discussed above. Hence, even if federal questions can in a proceeding of this kind be considered as properly raised when presented for the first time in an assignment of errors in the Supreme Court, those suggested by plaintiff were not passed upon or involved in the decision which this Court is asked to review.

In an elaborate and well-reasoned opinion the Supreme Court of Louisiana came to the conclusion that the contract for division of earnings upon which plaintiff's suit was founded was illegal and unenforceable upon the general principles of both the common and civil law, and the judgment appealed from, which dismissed the suit, was affirmed: "Having concluded," said the organ of the Court, "that the contract sued on was illegal as contrary to public policy, we see no necessity to discuss the two other grounds of exception set up by the defendant."

Plaintiff filed an application for a rehearing in which it presented, for the first time, except, perhaps, in argument before the Supreme Court, the federal questions upon which they now mainly rely. They claimed: 1, That the decree of the Court of New Mexico constitutes *res judicata* in respect to the defenses presented by defendant's exceptions. 2, That the Acts of Congress, referred to in the petition as the Acts by which plaintiff was incorporated, conferred upon the Texas and Pacific Railway Company the right to enter into an agreement with a competing or parallel railroad company for division of earnings from competitive business, the laws or public policy of any State to the contrary notwithstanding. 3, That as the subject matter of the contract sued on related to interstate commerce, the decision of any State court construing it and refusing, to enforce it constituted an unlawful interference with interstate commerce.

Without assigning any further reasons for its decision, the Supreme Court of Louisiana refused the rehearing.

An application was then made to the Chief Justice of Louisiana for a writ of error. The grounds upon which the writ was claimed are thus stated in the petition for it: "That in the record and proceedings and in the rendition of said final decree or judgment, there was drawn in question *the validity of* Statutes of, or of authority exercised under, the United States, and said decision was against their *validity;* and there was drawn in question *the validity of* a Statute of, or an authority exercised under, said State of Louisiana, on the ground of their being repugnant to the Constitution or Laws of the United States, and said final decision was in favor of such, their validity; and there was in question the construction of clauses of the Constitution and

Statutes of the United States, and said final decision was against the title, right, privilege and exemption *specially set up and claimed* under such clauses of said Constitution and Statutes." (Italics ours).

The Chief Justice, being convinced that the Supreme Court of Louisiana had not in their decision passed upon *the validity* of any law of the United States or of the State of Louisiana or of any authority exercised under either government, and that no right, title, privilege, or exemption under the Constitution or laws of the United States had been *specially set up or claimed* by plaintiff and denied by the Court, refused to allow the writ of error. His Honor, Justice Lamar, subsequently allowed the writ.

ARGUMENT ON THE MOTION TO DISMISS.

We shall first state the principles of law upon which the motion to dismiss is based and then discuss, as briefly as possible, the different federal questions upon which we suppose the plaintiff in error relies to sustain the jurisdiction of this Court:

1. It must appear from the record that one of the jurisdictional questions was expressly or by necessary intendment raised and decided in the State Court. It is not sufficient that such a question *might* have been raised.

In *De Saussure vs. Guillard*, 127 U. S. p. 234, this Court held that before a case of error was made out "it must appear affirmatively not only that a federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment rendered could not have been given without deciding it."

For a strong statement of the law on this subject see *Railroad Company vs. Rock*, 4 Wall. 177.

2. When there are several possible grounds for the decision of the State Court, some presenting federal questions and some not involving such questions, and the decision is based upon one of the latter grounds, which is sufficient to support it, no writ of error lies.

An application of this doctrine will be found in *Crossley et al. vs. City of New Orleans et al.*, 108 U. S. 105. In that case the Court said that it "was settled long ago" that in cases coming from Louisiana the opinion of the Supreme Court should be examined, if necessary, to determine whether the judgment is reviewable.

In the syllabus to the case of *McManus vs. O'Sullivan et al.*, 91 U. S. 578, the law is thus stated: "This Court has no jurisdiction to re-examine the judgment of a State Court where a federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case."

In *Kennebec Railroad vs. Portland Railroad*, 14 Wall. 23, the Court re-assert the principle "that, in cases brought here by writs of error to the State Courts, it will not entertain jurisdiction if it appears that, besides the federal question decided by the State Court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it."

The case of *Hale vs. Ackers*, 132 U. S. 554, contains a collection of authorities on this point. See also *Hopkins vs. McLure*, 133 U. S. 380, and *San Francisco vs. Itsell*, Id. 65.

3. "*When a decision holding a contract void is made by the highest Court of a State upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one which this Court is not authorized to review.*" *Tarver vs. Keach*, 15 Wall. 67; *Delmas vs. The Insurance*

Co.. 14 Wall. 661; *N. Y. Life Insurance Co. vs. Hendren*, 92 U. S. 286; *Marrow vs. Brinkley*, 129 U. S. 178.

The application of these principles of law to the instant case is so obvious that no argument or comment is necessary.

4. The statute requires that the title, right, privilege or immunity claimed to exist by reason of some statute of, or authority exercised under, the United States, must have been "*specially set up or claimed.*" This means that it must affirmatively appear from the face of the record that the federal question was raised, *i. e.* from the pleadings, evidence, instructions asked, or exceptions taken, in the court below. It is not enough that it was presented in the argument before the State Supreme Court, or in an assignment of errors, or in an application for a rehearing.

In the case of *Worthy vs. The Commissioners*, 9 Wall. 611, the Court held that the existence of a right, title, privilege or immunity under the statutes or Constitution of the United States was not of itself sufficient. It should also appear that such right, title, etc., was specially set up and claimed before a writ of error can be properly allowed.

"It (the jurisdictional question) must appear in the pleadings of the suit, or from the evidence in course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the Court." *Parmelee vs. Lawrence*, 11 Wall. 36.

In the case of *Spies vs. Illinois*, 123 U. S. p. 181, this Court refused a writ of error because it did not appear that the right, title, etc., alleged to give jurisdiction under §709, had been "specially set up or claimed at the proper time, in the proper way" in the lower court.

The necessity for specially setting up or claiming at the proper time in the proper way in the court below any federal question urged to support a writ of error to a State Court was again fully discussed and instructively applied in the cases of *Brooks vs.*

Missouri, 124 U. S. 394, and of *Chappell vs. Bradshaw*, 128 U. S. 132.

It is not enough that the jurisdictional question was presented in argument before the State Supreme Court, *Railroad Company vs. Rock*, 4 Wall. 180; *Parmelee vs. Lawrence*, 11 Wall. 36; or in an application for a rehearing, *Boom Co. vs. Boom Co.*, 110 U. S. 57; or in an assignment of errors, which is nothing more than mere assertions. *Marlbery vs. Ohio*, 24 How. 413; *Millingers vs. Hartupec*, 6 Wall. 258.

We believe we could safely leave the matter with the Court without further argument than the statement that the federal questions, alleged by plaintiff in support of the jurisdiction of this Court, were either not specially set up or claimed in the proper way at the proper time in the court below, or were not decided or necessarily involved in the judgment of the Supreme Court of this State; but in view of the amount involved and the importance to the defendant in error of a speedy conclusion of this litigation, we ask the indulgence of the Court while we give special attention to the three federal questions which were attempted to be raised in the application for a rehearing.

1. It is claimed that the Acts of Congress incorporating the plaintiff Company conferred upon it the right to make contracts like that contained in Section VI of the Gould-Huntington Agreement; in other words, that the plaintiff Company has an absolute right conferred upon it by the Congress of the United States to make any pooling agreements it chooses with competing or rival railroad companies. Hence, for a State Court to hold that any pooling contract, to which plaintiff is a party, is illegal and contrary to public policy constitutes a denial of a right and privilege conferred by a Statute of the United States.

In answer to this contention we maintain that this federal question was not specially set up or claimed in the pleadings, evidence, exceptions taken, or in any other way in the court below, but only in this application for a rehearing filed in the Supreme Court of the State. The analysis of the entire record made in the opening of this brief shows that, until the rehearing was applied for, there was nothing whatever in the record to inform the State Supreme Court that such a right or privilege had been asserted by plaintiff. Hence, we find no mention of it in the elaborate and carefully prepared opinion of that Court.

In a case similar in this respect to the one at bar, where the plaintiff in error sought to support the jurisdiction of this Court by claiming that certain rights conferred by its charter had been ignored by the State Supreme Court, the Court said: "There is nowhere, either in the pleadings, the evidence, or the suggestions of counsel, prior to the judgment, so far as we have been able to discover, even an intimation that the Susquehanna Company claimed any contract right under its charter to exclude the West Branch Company from such use as that Company was making of the north half of the stream. The only controversy apparently was about the right of the West Branch Company, under its charter, to such use at all. 'Certainly,' as was said in *Brown vs. Colorado*, 106 U. S. 95, 'if the judgments of the Courts of the States are to be reviewed here on such' [that is to say federal] 'questions, it should only be when it appears unmistakably that the Court either knew, or ought to have known, that such a question was involved in the decision to be made.'

The fact that on a petition for a rehearing it was suggested that if the charter of the West Branch Company was so construed as to give it the right to maintain its sheer boom in the north half of the stream, that charter would impair the obligation of the contract of the State with the Susquehanna Company, is unimportant here, because our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for a rehearing. Such a petition is no part of the record on which the judgment rests." *Boom Co. vs. Boom Co.*, 110 U. S. p. 58.

There was certainly nothing in plaintiff's describing itself in the opening of its petition as incorporated by and under certain acts of Congress to inform the Court of the remarkable right and privilege it now claims to have been conferred by those acts.

In the case of *Detroit Railway Co. vs. Guthard*, 114 U. S. 133, the plaintiff in error, in order to show jurisdiction, asserted that a contract right conferred by its charter had been impaired within the prohibition of the federal constitution. Held, that the State Court was right in refusing a writ of error, because, while such a right might have been set up and claimed, yet it appeared from the record that it had not been specially set up or claimed in the proper time and in the proper manner. What the Court said of that case is true of ours, that no judge, in deciding the case as it came up in the record, would be likely to suppose that, if he gave judgment for defendant (on the ground of the illegality of the contract sued on), he would deny the plaintiff any "right, title, privilege or immunity" "specially set up or claimed" under the Constitution or laws of the United States.

2. It is next claimed that, as the agreement for division of earnings relates to earnings from interstate as well as from intrastate traffic, the decision of the Supreme Court of Louisiana declaring the contract illegal upon the general principles of law and public policy was an interference with the freedom of interstate commerce within the prohibition of the commerce clause in the Constitution of the United States.

We confess we do not understand this proposition. It seems to assert that this Court has jurisdiction to review the judgment of a State Supreme Court in any case where a contract relating to interstate commerce is concerned and the decision of the Court is against the validity of the contract or any part of it. For instance, a railroad company is sued for the loss of or damage to some article taken for transportation between two or more States. It sets up in defense a stipulation in a bill of lading exempting it from responsibility for loss or damage due to its own negligence. The State Court decides, not in virtue of any particular State statute but upon general principles of law and public policy, that such a stipulation is illegal, and gives judgment against the carrier. According to the doctrine now contended for by plaintiff in error, such a decision would raise a federal question sufficient to give this Court jurisdiction to review the case by writ of error. If this be true, a new source of jurisdiction for this Court has been discovered.

The plaintiff in error virtually contends that, as Congress has passed no law prohibiting immoral or illegal contracts relating to interstate commerce, it intended that all parties should be free in respect to this class of contracts to be as immoral and lawless as they chose, and that such contracts should not be amenable to the defenses of immorality, illegality, contrary to public policy, and the like. In our opinion the exact contrary is the truth. Until Congress legislates on the subject the State Courts are perfectly free to deal with contracts affecting interstate commerce as they would any other contracts and judge them according to the principles of Common and Statute law which prevail in the State of the *forum*. As there is no Common law of the United States how else could the courts of the various States administer justice in the vast number of cases growing out of contracts relating to interstate commerce? See *Smith vs. Alabama*, 124 U. S. pp. 473 flg., p. 478; *Nashville, etc., Railway vs. Alabama*, 128 U. S. 101.

We believe it is a sufficient answer to plaintiff's contention to say that the constitutional prohibition upon which it is founded is aimed at the legislative power of the State and not at the decisions of its Courts.

3. It is finally claimed that a certain decree of a district court of New Mexico opposes the bar of *res judicata* to the defenses made by defendant and that the finding of the Supreme Court of Louisiana, that the decree of the court of New Mexico had nothing whatever to do with the matters and things at issue in this cause, amounted to a denial of a right claimed under an authority exercised under the United States. When we come to argue the motion to ~~dismiss~~ affirm we apprehend no difficulty in convincing this Court that it is clearly manifest from a simple inspection of the decree that the State Supreme Court decided the question correctly. We shall endeavor now to show the Court that the alleged bar afforded by that decree was not specially set up or claimed in the lower court but was an afterthought urged for the first time in the argument before the Supreme Court, and that the decree was not authenticated in the manner prescribed by Congress.

The thing adjudged is one kind of estoppel which may be set up to prevent a person from re-asserting something which has already been decided against him in a previous suit. Now, if plaintiff intended to urge the decree of the court of New Mexico as an estoppel of record against any denial by defendant of the binding and enforceable character of the pooling contract sued on, there were two ways in which he could have specially set up and claimed this effect for the decree. When defendant pleaded that the parties to the pooling agreement were owners of parallel and competing lines of railway and the pool was, therefore, injurious to the public and, hence, illegal, and also that some of the essential parties were situated wholly within the State of Texas and, hence, subject to the prohibition in the constitution of that State, and offered evidence in proof of the facts pleaded, then plaintiff should have interposed the objection of *res judicata*, offered in evidence a certified copy of the decree relied on, and taken exceptions to the ruling of the Court denying the effect claimed for the decree. But, so far from doing this, plaintiff made no objection to evidence in proof of the facts alleged by defendant in respect to the illegality of the contract sued on, offered counter-evidence to disprove these facts, did not introduce in evidence the decree upon which he now relies, and, so far as the record shows, submitted the question of the illegality of the contract upon its merits without objection or exception and without any intimation of the rights which he now claims were conferred by the decree.

Again plaintiff might have specifically declared in his petition that the agreement for division of earnings, or pooling contract, contained in Subdivision VI of the Gould-Huntington Agreement, had been adjudged to be valid and binding upon the parties to the pool by the decree of the territorial Court, and alleged the other essential incidents to the plea of *res judicata*. If, with these allegations in his petition, he had objected to any evidence to prove the facts averred by defendant to establish the illegality of the contract sued on, on the ground that all such questions had been conclusively settled by the decree of the district court of New Mexico, and offered in evidence a duly certified copy of the decree and reserved exceptions to the overruling of his objection, the right now asserted would have been "specially set up or claimed" in accordance with the requirements of the law.

But, instead of pursuing either of these courses, plaintiff simply states incidentally in his petition that the Gould-Huntington Agreement had been made a decree of the Court in some litigation in New Mexico, as would appear from a copy of the decree annexed to and made part of the petition. Explaining and construing this vague and indefinite allegation, as we have a right to do, by the document annexed and made part thereof, it amounts to this declaration: That, in a certain suit in the District Court of the Third Judicial District of New Mexico in which the Texas and Pacific Railway Company was plaintiff, and the Southern Pacific Railroad Company (of New Mexico), the Southern Pacific Railroad Company (of Arizona), the Southern Pacific Railroad Company (of California), the Los Angeles and San Diego Railroad Company, and the Central Pacific Railroad Company (none of them parties to the pooling contract sued on) were defendants, a decree was entered by consent of parties, in which the Court found that the parties had entered into the Gould-Huntington Agreement, and, thereupon, in consideration thereof and by consent of parties, it ordered, adjudged, and decreed, that the plaintiff's line of railway, which approached El Paso from the east, and the defendant's lines of railway, which extended westward from El Paso to the Pacific Coast, should be thereafter operated as far as the public was concerned as one continuous line, and that the defendant railroad companies should be confirmed in their respective rights of way, free from any claims of the plaintiff company; and it was further ordered and decreed that the Gould-Huntington Agreement, which in one of the independent contracts incorporated therein had stipulated for just such an arrangement between the litigants, should be made a part of the decree so far as it affected the parties to the suit and the matters in dispute between them; and it was further declared in said decree that it was rendered by consent of the parties to the suit to carry out the provisions in the Gould-Huntington Agreement in respect to the matters in litigation between said parties, but was not intended to otherwise affect or interfere with the provisions of said agreement.

Would such a declaration constitute a special setting up or claiming of the rights which plaintiff in error now claims were conferred by this decree? Can plaintiff now be heard to declare that he specially set up and claimed and presented for the decision of the lower court, that the decree in question was a bar to the defenses urged by defendant, when he was silent on the subject during the trial, and allowed the case to be tried and decided on the merits of those defenses?

It is no answer to this argument to say that it appears from the opinion of the Supreme Court of Louisiana that the question was raised and passed upon. If what we have just written about plaintiff's failure to present the question in the lower court be true, the question must have been raised for the first time in the argument before the State Supreme Court. The record contains two full and detailed statements by plaintiff of the errors committed by the lower court. In neither the motion for a new trial nor in the elaborate assignment of errors filed in the State Supreme Court is there any reference to the decree of the District Court of New Mexico and its effect as *res judicata*. The Supreme Court, moreover, refer to the question as a point "made by plaintiff's counsel." It is well settled that this Court cannot re-examine the judgment of a State Supreme Court when the federal question alleged as conferring jurisdiction was not specially set up or claimed at the proper time in the proper way but was presented for the first time in argument before the State Supreme Court. We submit that it is not competent for a State Court to enlarge the jurisdiction of this Court by considering federal questions raised for the first time in argument. See, *Railroad Company vs. Rock*, 4 Wall. 180. Considering the state of the record, it was not necessary for the State Supreme Court to pass upon the point "made by plaintiff's counsel," and in doing so they decided a question not "specially set up or claimed" at the proper time in the proper way.

We call the Court's attention to the fact that the document annexed to the petition and purporting to be a decree of a territorial court in New Mexico is not certified in any way, and is not even signed. Now, the Constitution provides that full faith and credit shall be given in each State to the records and judicial proceedings of every other State, but Congress is empowered to prescribe the manner in which such records and proceedings shall be proved and the effect thereof. Congress has accordingly provided (Revised Statutes, §905), that the records and judicial proceedings of "any State *or Territory*" shall be proved by the attestation of the clerk and the seal of the Court, together with a certificate of the Judge, etc., and that the said records and judicial proceedings "*so authenticated*" shall have such faith and credit, etc. We submit that no right under judicial proceedings in any State or Territory can be properly presented or raised in the Courts of another State so as to give this Court jurisdiction to review a judgment of the State Court denying the right, unless the judicial proceedings relied on are found in the record authenticated according to the act of Congress. It may be urged that defendant's failure to object to the want of proof of the decree was a waiver of proper authentication. Such objections could be urged only on the trial in the lower court. As the decree was not introduced in evidence and as no rights were claimed under it in the lower court, but the right of defendant to attack the contract was tacitly admitted by plaintiff's going to trial on the merits of the defense, defendant had no opportunity or cause for objecting. It is also claimed that the mode of defense adopted by defendant was equivalent to a demurrer, and, hence, admitted the allegations of the petition. That peremptory exceptions differ radically from a demurrer appears from the fact that evidence was offered *pro* and *con* upon the disputed facts. But it is well settled that the admissions resulting from a demurrer do not extend to inferences which may be drawn from vague and indefinite allegations or to the meaning and effect placed by plaintiff on a written document annexed to the petition. "So a demurrer to a pleading admits only such allegations thereof as are properly or well pleaded; inferences and conclusions of law are, therefore, not so admitted." *Boone on Code Pleading*, Vol. 1, §118. "Nor does a demurrer admit the truth of alleged facts which are contradicted by the exhibits, * * * nor is the correctness of averments concerning the meaning of a paper admitted." *Bliss on Code Pleadings*, §418, p. 501. "If the pleading misstates the effect and purpose of the statute upon which the party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges. *Dillon vs. Barnard*, 21 Wall. 430, 437." *Pennie vs. Reiss*, 132 U. S. 470.

Finally, we maintain that no federal question is involved in the refusal of the Supreme Court of Louisiana, upon general principles of law, to extend the conclusive effect of the decree of the New Mexico Court to a case between different parties, or to matters and things not in controversy or decided in the cause in which the decree was rendered. *Blount vs. Walker*, 134 U. S. 607.

ARGUMENT ON THE MOTION TO AFFIRM.

If the Court finds it cannot grant the motion to dismiss, we ask that it affirm the judgment of the State Court on the ground that it is manifest that the writ of error was sued out for delay only, and also because the questions upon which the jurisdiction depends are so frivolous as not to need further argument. We believe that if the Court will examine the record and the decision of the State Supreme Court it will come to the conclusion that, if any federal question was passed upon, the decision in that regard was so clearly right as not to require argument. We shall discuss briefly two federal questions alleged to have been decided.

1. The right claimed to have been conferred upon plaintiff in error by act of Congress to make with rival and competing railroad companies agreements for a division of earnings from competitive traffic. Plaintiff claims that Congress conferred upon it the right to make pooling contracts with any railroad company, no matter how violative of the laws or public policy of the States or how injurious to the public.

The Court will search the acts of Congress found in the record in vain for any provision supporting in any way plaintiff's pretensions. We are entirely in the dark ourselves as to what provisions in the various acts found in the record are supposed to confer the extraordinary privileges claimed. After careful examination of all of them, we have selected sections 4 and 5 of the Act of March 3, 1871, as the only provisions which by the utmost stretch of the imagination could form any ground for plaintiff's asserted rights.

The preceding sections having authorized the building of a railroad from Marshall, Texas, to or near El Paso, and thence through New Mexico and Arizona to the Pacific Coast, Section 4 gives the plaintiff Company the right to purchase or consolidate with any railroad company or companies "on the route prescribed in the first Section of this Act; but no such consolidation shall be with any competing through lines of railroads to the Pacific Ocean."

The manifest object and extent of this clause was to empower the Texas and Pacific Railway Company to speedily and economically secure a through continuous line of railway to the Pacific Coast by purchasing or consolidating with any railroad along its route, *i. e.*, connecting line, and thus avoiding the time and expense of building a road the entire length of the route. To say that this provision authorized plaintiff to form partnerships or pooling agreements with its competitors, is too frivolous a pretension to deserve further notice.

Section 5 provides, "that the said Company shall have power and authority to make running arrangements with any railroad company or companies heretofore chartered or that may hereafter be chartered by Congressional, State or Territorial authority."

"Running arrangements" and pooling agreements differ *toto coelo* from one another. The former are made between *connecting* lines and are intended to provide for the running of through cars or trains; the latter are made between *competing* lines and are designed to lessen or destroy competition. Arrangements for through transportation are entirely unobjectionable, a through ticket or a through bill of lading being of great convenience and advantage to the public. Pooling arrangements, on the other hand, or agreements for division of earnings from competing traffic, have always been reprobated by the Courts and have almost universally been held to be illegal and contrary to public policy. We submit that it is too clear to require argument that the authority given above to make "running arrangements" with other railroads does not confer the right to make the pooling contract sued on, which is an agreement for division of earnings from competitive business between two systems of parallel and competing railroads that together control the carrying trade of the vast extent of country between El Paso and the Gulf of Mexico.

2. The contention that the decree of a court in New Mexico annexed to the petition is *res judicata* as to the defenses presented by the defendant's exceptions remains to be considered.

It is believed that when the nature and terms of the Gould-Huntington Agreement are understood it will clearly appear that the right so tardily claimed under the decree in question is unfounded and frivolous, a straw grasped in desperation to secure the delay which a writ of error might afford. We shall accordingly ask the Court to examine the agreement in the light of the following suggestions as to its nature and meaning.

On November 26, 1881, Mr. C P. Huntington, who then owned or represented a controlling interest in a number of railroad companies, entered into an agreement with Mr. Jay Gould, who controlled another set of railroad corporations, for the purpose of settling some disputes which then existed between some of the companies which they respectively represented and for the purpose of preventing possible future causes of controversy between any one or more of the railroads then or thereafter controlled by either of them. On February 25, 1885, this agreement was modified in some respects, not necessary to detail in this connection, by an instrument known as the "Modification of the Gould-Huntington Agreement." This agreement and its modification were annexed to the petition and made part of it as exhibits "A" and "B."

An examination of the G.-H.-Agreement will show that the two representatives of large corporate interests availed themselves of one instrument to embody in a permanent and convenient form their agreements in reference to a variety of distinct and independent matters. The result was, not one united interdependent contract, but several independent contracts capable of separate enforcement and entirely distinct and separable both in respect to the parties, the subject matters, and the considerations. This separable character of the agreements, in connection with the separate and independent ratification, provided for in the agreement, by each company of such agreements only as concerned it, makes the several contracts bear the same relation, or rather want of relation, to each other as if they had been embodied in so many separate instruments. This is specially true of the pooling contract sued on, contained in Subdivision VI of the agreement, which is complete in itself, concerns only certain corporations east of El Paso, and has for its sole consideration the advantages expected to flow from the mutual agreements therein contained.

It was provided in the G.-H.-Agreement that it should be ratified by the railroad corporations therein enumerated as represented by Mr. Huntington and by Mr. Gould respectively, and that, when ratifications had been exchanged between these various companies, the personal obligations of Mr. Huntington and Mr. should cease. These ratifications were made and exchanged, as stated in the petition, and Mr. Huntington and Mr. Gould have passed from the scene. Now the interests of these two men formed, as it were, the connecting links which gave to this multifarious agreement a semblance of unity and interdependence. When their connection with it ceased, it became simply the repository of several distinct and independent contracts with separate and independent objects and considerations and different and independent obligors and obligees. Some of the railroad companies had no concern or interest whatever in the considerations or obligations of some of these contracts, while those companies who were interested were entirely unaffected by other contracts contained in the agreement. Hence, it was provided in the last clause of the agreement that in ratifying it the various railroad companies should do so only "so far as the same severally affects them respectively." And, accordingly, it was further provided in Section XV, that any one or more of the ratifying companies could sue any one or more of the others to protect or enforce any right conferred by the agreement without joining in the suit all the companies who might have ratified the agreement.

One of the objects of the G.-H.-Agreement was to settle some disputes and litigation between the Texas and Pacific Railway Company on the one side, and the Southern Pacific Railroad Companies of New Mexico, Arizona, and California on the other side. The nature of the disputes sufficiently appears from the terms of the agreement and from the decree of the New Mexico Court annexed to the petition. The projected line of the Texas and Pacific Railway Company extended to El Paso; it required an outlet to the Pacific Ocean. The Southern Pacific Railroad Companies formed in connection with the Central Pacific a through line from El Paso to the Pacific coast. The Texas and Pacific Railway Company claimed to possess certain franchises west of El Paso and certain rights of way over the land on which the Southern Pacific Railroad Companies had been built. An object of the agreement was to effect an arrangement by which the one company could secure a continuous line to the Pacific, and the other companies could be quieted in the possession of their properties. The first five sections of the agreement effected this, and together form one of the distinct contracts contained in the agreement. The Texas and Pacific Railway Company relinquished to the Southern Pacific Railroad Companies its rights, franchises, etc., west of El Paso, and *in consideration of this relinquishment* secured the right to operate the lines of these companies as if they were a continuation of its own line. It thus secured an outlet to the Pacific Coast without the expense of constructing a road of its own. It was given as complete control over the lines west of El Paso, as far as its traffic was concerned, as it could have had over a continuation of its own line. We call the Court's attention to the fact that the consideration for this particular contract were the only special considerations, given at the time, mentioned in the agreement. They do not extend to or affect the other contracts contained in the agreement, each of which contains in itself its own sufficient consideration. So, in the recitals found in Section XIV of the agreement, it is expressly declared that "the consideration to the said Texas and Pacific Railway Company for the said relinquishment and release is the agreement of the said Southern Pacific Railroad Companies, that the said road of the Texas and Pacific Railway Companies, and the roads of the three Southern Pacific Railroad Companies and their connections" (*i. e.* west of El Paso) "shall be operated forever as one continuous line as aforesaid."

After this arrangement between the Texas and Pacific Railway Company and the three Southern Pacific Railroad Companies had been provided for, we find in Section VI the contract now sued on, a "Mutual Agreement to 'Pool' New Orleans and Galveston Traffic," etc. When the G.-H.-Agreement was ratified by the Companies, this Section VI resulted in an agreement between the Texas and Pacific Railway Company and its connections east of El Paso concerned in the carriage of New Orleans or Galveston traffic, on the one side, and the Galveston, Harrisburg and San Antonio Railway Company and its connections east of El Paso competing for such traffic, on the other side, for a division of earnings from this competitive traffic in a certain agreed proportion. By the modification of February 18, 1885, the terms of the pooling agreement were changed so as to include traffic carried through New Orleans from New York and other points, and a different mode of dividing the gross earnings was provided.

It was also then stipulated that all claims under the pooling agreement down to November 1, 1884, were released.

The pooling clause clearly constitutes an entirely distinct and separable contract from the rest of the agreement. It is capable of separate enforcement and can stand or fall by itself. Its sole consideration was the mutual advantages expected from a division of earnings and the cessation of competition which would thus be effected. The Supreme Court of Louisiana considered this pooling contract to be "a complete and independent contract, with a sole consideration, which was the mutual advantage to be derived therefrom by the companies to be affected thereby. The clause or contract, as shaped, has reference to no other portion of the agreement, which is complete for the purposes originally contemplated, without the contract contained in that clause (Section VI)—as complete as the contract formulated in the Section stands, without any reference to any or all of the other provisions of the agreement."

It is unnecessary to analyze the whole G.-H.-Agreement. The Court will find on examining it that the several other agreements contained in it have the same independent character that the pooling clause has and have no connection with the arrangement between the Texas and Pacific Railway Company and the three Southern Pacific Railroad Companies.

We are now prepared to examine the decree of the New Mexico court. It was rendered in a litigation already pending when the G.-H.-Agreement was made and before the subject matter of the present suit had come into existence. The litigants were the Texas and Pacific Railway Company and the three Southern Pacific Railroad Companies together with the connections of the latter extending to the Pacific Ocean. The matters in controversy were the disputes which were settled by one of the independent contracts contained in the G.-H.-Agreement and discussed above. The decree recited in full and adjudged and decreed the provisions of the G.-H.-Agreement which contained the terms of the settlement of the matters in controversy, and, by consent of the parties, made the G.-H.-Agreement "in this behalf" a part of the decree, providing, however, that this was done only in respect to the parties to that suit and that it did not otherwise affect or interfere with the provisions of the agreement. The whole scope, meaning, purpose, and effect of the decree was to settle such rights as were then in litigation and controversy and to confer on the parties to that suit the rights enumerated in the decree and agreed to in the G.-H.-Agreement as the consideration for the settlement of the disputed matters. Now the agreement for division of earnings now sued on was not then in controversy or litigation, nor was it mentioned in the decree as a consideration for the relinquishment or settlement of matters in dispute or as one of the rights conferred on the parties. Hence it was no part of the decree and is one of the provisions of the agreement which the decree does not "affect or interfere with." What interest or concern had the defendants in that suit in the pooling contract? What right had they to stand in judgment for the Galveston, Harrisburg and San Antonio Railway Company and its eastern connections, independent railroad corporations, who were the parties to the pooling arrangement?

The fact that at the time the present suit was instituted the defendant in error, incorporated in 1884, was operating all the railroad companies represented in 1881 by Mr. Huntington does not, of course, alter the nature of the G.-H.-Agreement or enlarge or alter the nature and effect of the decree of the territorial court.

In discussing this decree the Supreme Court of Louisiana said:

"Undoubtedly the attempt of either party to the 'Gould-Huntington' Agreement to avoid collaterally the effect of the adjustment of any contentious matter, or of any litigious rights involved in litigation hitherto pending and which had been in terms settled by the compromise, would have been defeated by the simple application of the principle now under consideration. But the subject matter of Article 6 of the agreement, which is now in suit, was not a subject of contention between the parties, either as a difference or in the shape of any pending litigation, at the time that the agreement was entered into. In fact, it had no existence before, and was only brought into being or life by the contract of November 26, 1881, and it had no reference to the past, but its whole operation or effect was intended exclusively for the future.

"This was manifestly the understanding of all the parties at the time; it shaped the action of their counsel who, thereafter, invoked judicial confirmation of the adjustment; and it was the sole guide of the court when it rendered the decree now set up as *res adjudicata*, touching all matters and stipulations contained in the 'Gould-Huntington' Agreement.

"In formulating its decree the Court was careful to enumerate in detail all the litigious matters which were in suit between the several railroad companies which had participated in the adjustment and which were parties to litigation then pending before the Court, and it requires no argument to show that no other matters or stipulations in the agreement were in any way or degree affected by the judgment then rendered.

"To clear away any doubt which might thereafter exist or be suggested as to the precise meaning, bearing, intent, and effect of the judgment rendered, the Court made the following explanation of its own decree, as part of said decree:

"The aforesaid decree is made to carry out the provision *in* *this behalf* of said agreement, dated November 26th, 1881, which is hereby made a part of this decree, and by consent of the parties and upon consideration by the Court, is hereby ordered and decreed to be binding upon each and all of the parties hereto in all its stipulations and agreements as therein shown, and said decree does not *otherwise affect or interfere with the provisions of said agreement.*" (Italics are ours).

"Hence, we conclude and we hold that the stipulations of Article 6 of the 'Gould-Huntington' Agreement have not the force and effect of the thing adjudged, and that they are lawfully liable to attack in the mode and manner herein adopted by the defendant corporation."

We submit that the decision of the State Supreme Court is so clearly right and the contention of the plaintiff in error so unfounded, and hence so frivolous, that no argument of the question is necessary.

Something more than the bare assertion of the existence of a right under a judgment of a federal court would seem to be essential to support the jurisdiction of this Court. If from an examination of the record it is manifest that no judgment conferring the right claimed was ever rendered then the writ of error should be dismissed or the judgment of the State Court affirmed. *Millingar vs. Hartupee*, 6 Wall. 258.

Respectfully submitted,
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